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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

CAROL C. PEELER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether either the Fifth or Sixth Amendment to the United States Constitution affords a basis of relief to a person whose pre-indictment retained counsel betrays her by failing to communicate the Government's unequivocal offer of transactional immunity because he was being "loyal to the others" instead of his client?

Whether the Fifth Circuit's action in partially self-selecting the panel to consider this case on rehearing violates due process?

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

(1) Carol C. Peeler, Defendant/Petitioner;

(2) Arnold A. Vickery, of the firm of ARCHER, WALDNER, & VICKERY, L.L.P., 2929 Allen Parkway, Suite 2770, Houston, Texas 77019

(3) United States of America, Plaintiff/Respondent;

(4) Robert D. Lindsay, Chief, Criminal Division, Department of Justice - Tax Division, 10th & Constitution Avenue, N.W., Suite 4131, Washington, D.C. 20530

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None of the opinions of the courts below are reported. In accordance with Supreme Court Rule 14.1(k), all are reproduced in the appendix.

Grounds for Jurisdiction

(i) Peeler seeks certiorari to review the January 19, 1994, opinion and judgment of the Fifth Circuit Court of Appeals.

(ii) Peeler's Motion for Rehearing was denied on February 16, 1994.

(iii) Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Statement of the Case

The operative facts of this case are simple, but alarming. They are recited in some detail in Peeler's Motion for §2255 Relief and accompanying exhibits, and reiterated in a separate chronology, both of which are included in the Appendix to the Petition. See Tr. 00134-165. Consistent with the admonitions of Rule 14(g), we recount only the most essential facts in "**concise**" fashion.

The gravamen of Peeler's Motion is that the Government offered her immunity, through her lawyer, in December of 1985, in exchange for her voluntary cooperation and truthful testimony, and that her lawyer chose not to tell her about the Government's offer or otherwise to pursue it because he was being "loyal to the others", i.e. the other potential codefendants and their counsel, all of whom were signatories to a joint defense pact.

According to the sworn testimony of the AUSA assigned to prosecute this case, he told Peeler's lawyer that "I would offer her immunity from the beginning of time to the end of the world as concerned the Hillcrest Securities activities." Exhibit 3 to §2255 Motion, Alexander Deposition at pp. 17-18. Subsequently, AUSA Alexander confirmed again that the offer was made. His affidavit stated simply that "on or about December 1-3, 1985, I made a definite, unambiguous offer of transactional immunity regarding all Hillcrest matters to Darrell Jordan, the attorney for Carol Peeler. Specifically, as best I recall, I advised Mr. Jordan that the government was willing to 'forgive all of Ms. Peeler's sins regarding the Hillcrest matter from the beginning of the world until the end of time' in exchange for her cooperation. The immunity offer extended to Ms. Peeler's husband as well, and would have prevented both of them from being indicted or prosecuted had Mr. Jordan

communicated Ms. Peeler's acceptance of the offer to me."

Darrell Jordan has admitted in sworn testimony that an effective or reasonable defense lawyer should communicate an offer of immunity to his client, and he has also admitted that he did not communicate any offer of immunity to Carol Peeler. Exhibit 9 to Motion, Jordan Deposition at pp. 7-9.

The question of why Jordan failed to communicate the offer is germane to the legal issue of prejudice under the applicable case law from this Court. The record before the Court demonstrates that the reason Jordan betrayed his own client was -- **in his own words**

> "we were remaining loyal to the other people".

Exhibit 10 to §2255 Motion, Deposition of Sally Giddens, **quoting Darrell Jordan**, at p.54. The "other people" were the lawyers and potential codefendants in the joint defense pact. The reason that Jordan thought that it was necessary

to put the question of immunity for his own client on the back burner was that, he and the other defense counsel had launched an end run around prosecutor Alexander via a joint defense stratagem known as the "GIDEON INITIATIVE". In order to give that initiative a chance to work, it was important that the prosecutor not perceive any "cracks in the dyke" [sic]". Exhibit 14 to §2255 Motion, HUGHES & LUCE internal memorandum dated January 21, 1986, to Darrell Jordan. Jordan made the decision to withhold the immunity offer from his client and to defer the opportunity for immunity, even though his associates had advised him in writing that "[t]he **risks of doing so are** that Bill [Alexander] will find another **crack in the dyke** [sic], or develop additional harmful information on Carol." Id.

Unfortunately for Carol Peeler, Jordan's unilateral decision to gamble with her freedom did not work out. Prosecutor Alexander found another crack in the dike in the

personage of Hillcrest principal Buzz Tompkins. Tompkins got immunity. Exhibit 18 to Motion (March 10, 1986 agreement between Tompkins and Government). Tompkins then shared some information with the government about the September 1982 "as of" trades. This information caused the government to alter the focus of its entire investigation and prosecution and to indict Peeler, her husband, and the other Hillcrest principals. Exhibits 5-8 to the Motion. Even though Peeler had been cleared by polygraph of having mens rea, (Exhibit 25 to Motion) the defense to this charge[1] was much more difficult because, indisputably, on two days in September of 1982, Peeler had executed trades "as of" earlier in that week. When Congress passed the tax bill in January of 1983 it made that portion of the law effective "as

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[1] Peeler was actually charged with multiple violations of 18 U.S.C. §371, all stemming from the September 1982 "as of" trades. This was the basis of federal jurisdiction in the lower courts. See Rule 14(i), S.Ct.R.

of" September 22, 1982, thereby rendering the deductions arising out of those trades putatively unlawful. Consequently, she was persuaded by one of her HUGHES & LUCE lawyers that she was "guilty" and should plead guilty to one count of the 22 count indictment so that the charges against her husband would be dropped.

Peeler plead guilty on March 31, 1989. Several days later she learned for the first time -- from reporter Giddens -- that the Government had, in fact, offered her immunity before Buzz Tompkins and that her lawyer had failed to tell her about it.

Argument

I. BOTH THE FIFTH AND SIXTH AMENDMENTS REQUIRE THE GOVERNMENT TO "HONOR, RESPECT AND PRESERVE" PEELER'S CHOICE OF COUNSEL AS THE "ESSENTIAL MEDIUM" OF COMMUNICATION BETWEEN THE GOVERNMENT AND HERSELF.

A. The Sixth Amendment "Ineffective Assistance" Analysis is NOT Coextensive with the "Critical Phase -- Appointment of Counsel Issue. All of the courts below have denied Sixth Amendment relief to Peeler -- not on the substantive constitutional merits of her claim -- but rather because they believed that their hands were tied by a single phrase from this Court's one page, per curiam, opinion in **Wainwright v. Torna**, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982). For this reason only this Court can remedy the situation and do justice in this case. This is a **compelling** reason for the Court to grant certiorari.

The phrase is "[s]ince respondent had no constitutional right to counsel, he could not be deprived of

the effective assistance by his retained counsel's failure to file the application timely". 102 S.Ct at 1301.

The reasoning of the lower courts in applying that phrase has been that (a) because Peeler was not entitled to **appointed** counsel at this stage of the proceedings against her, then (b) she was not entitled to constitutionally effective representation from the lawyer whom she hired to represent her. This is not only illogical, but also inconsistent with other Sixth (and Fifth) Amendment case law.

In **Torna** habeas relief was denied to a petitioner who complained about his retained counsel's failure to seek **discretionary** review by the Florida Supreme Court, after he had already been convicted and his conviction upheld on direct appeal. In denying relief the Court made the statement quoted above. Taken out of the factual context of the case, this seems, at first blush, to make the Sixth Amendment appointment of counsel analysis coextensive

with the "ineffective assistance" claim. But the factual context of **Torna** was markedly distinguishable from the case of Carol Peeler. Torna had already been adjudicated as guilty in a proceeding which comported with due process; thus, he had no presumption of innocence. Peeler, by contrast, had not even been formally indicted, so she still enjoyed the presumption of innocence.[2]

More importantly, subsequent opinions from this Court make it clear that **Torna** should not be applied so mechanistically. Two years after **Torna** the Court handed down **United States v. Gouveia**, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The Court denied relief. But in so doing it focused on the Sixth Amendment's right to **appointment** of counsel, and it carefully demonstrated that

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[2] Chief Justice Rehnquist noted this important distinction in **Pennsylvania v. Finley**, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993 (1987).

this Sixth Amendment right and the Sixth Amendment right to effective counsel are not coextensive:

> The narrow issue before the Court of Appeals and before us today is whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondents' situation. **Respondents have not contended that they were denied the opportunity to retain their own private counsel . . . Respondents also have not asserted a Sixth Amendment ineffective-assistance-of-counsel claim . . .**

104 S.Ct. at 2296n.1 [emphasis added, citations omitted].[3]

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[3] In view of this language in Gouveia which suggests that these Sixth Amendment rights are not necessarily coextensive, we do not address the more thorny issue of whether a person who is confronted with a prosecutor, a grand jury, and an immunity offer is at such a critical stage of the proceedings as to be entitled to appointment of counsel. Clearly Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), holds that the Sixth Amendment's right to counsel can attach before formal charges have been filed. So, too, does Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (defendant is entitled to appointed counsel at pre-indictment preliminary hearing). And certainly a person who does face that "skilled prosecutor" is in the very predicament that the Court envisioned in Gouveia and Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Although many courts view the plurality opinion in Kirby as establishing a "bright line" test, in fact the Court explained its constitutional concerns and the rationale for its holding in oft-quoted, practical, functional terms:

If the twin Sixth Amendment rights were coextensive, then this last sentence of Justice Rehnquist's opinion would be meaningless surplusage.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of **adversary criminal justice.** For it is only then that the government has **committed itself to prosecute,** and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant **finds himself** faced with the ***prosecutorial forces of organized society***, and immersed in the intricacies of substantive and procedural criminal law.

92 S.Ct. at 1882.

In December of 1985 Carol Peeler was confronted by very powerful "prosecutorial forces of organized society," including an experienced prosecutor who was telling her lawyer that he intended to convene a grand jury, summon her before that grand jury to testify, and, if she did not cooperate by accepting the immunity offer, he would ask that grand jury indict her. She was, in the words of Kirby deeply "immersed in the intricacies of substantive and procedural criminal law." If, as the Court held in Coleman a person is entitled to counsel at a pre-indictment hearing, then surely she would also be entitled to counsel when she was summoned before the grand jury to either testify or plead the Fifth. But see United States v. Williams, _____ U.S. _____, 112 S.Ct. 1735, 1743, 118 L.Ed.2d 352 (1992)

Therefore, if the Court retreats from the language of Gouveia, Peeler would ask the Court to carefully consider and apply these precedents to the peculiar facts of her case and hold that she was entitled to counsel at this juncture.

Other Sixth Amendment cases demonstrate what obligations the government has once an accused person has counsel. For example in **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985), this Court upheld the exclusion of taped confessions which were obtained by a police informant **after** Moulton had **invoked** his right to **hire counsel**. After quoting from other cases about the fundamental nature of the right to counsel, the importance of having the "guiding hand of counsel at **every stage** of the proceedings against him", and observing that "the right to the assistance of counsel is shaped by the need for the assistance of counsel . . . at earlier, 'critical' stages in the criminal justice process '**where the results might well settle the accused's fate**" the Court stated something that would seem to be a constitutional truism:

> Once the right to counsel has attached and been asserted, the State **must** of course **honor it**.

474 U.S. at 170 (emphasis added). The Court went on to elaborate: "This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an **affirmative obligation to respect and preserve** the accused's choice to seek this assistance." Id. at 170-71 (emphasis added).

In a footnote the Court explained one of the reasons that the government must "honor, respect and preserve" the attorney client relationship and the role of the lawyer as liaison between his client and the government: "'[T]he lawyer is the **essential medium** through which the demands and commitments of the sovereign are communicated to the citizen.'" Id at 171n.7, quoting **Brewer v. Williams**, 430 U.S., 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). See also 474 at 187-88 (Burger, C.J., dissenting) which quotes the ethical limitation of Disciplinary Rule 7-104(A)(1) of the

American Bar Association's Code of Professional Responsibility.[4]

This constitutional admonition to "honor, respect and preserve" the right to counsel clearly does not depend on whether the defendant is in the post-indictment "critical" phase at which he has a Sixth Amendment right to **appointed** counsel. The obligation also extends to a preindictment suspect who asserts his **Fifth** Amendment right to counsel. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Recently the Court observed that "[p]reserving the integrity of an accused's choice to

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[4] The Court reiterated the point again in Patterson v. Illinois, 487 U.S. 285, 290n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988):

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. **Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.**

communicate with police only through counsel is the essence of *Edwards* and its progeny". **Patterson v. Illinois**, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).[5]

In **Michigan v. Jackson**, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); the Court affirmed the overturning of a murder conviction because the police had obtained incriminating evidence after the accused had **asserted** his right to counsel. The holding demonstrates again that, for constitutional purposes, it really does not matter whether the right to have counsel emanates from a Sixth Amendment obligation on the government to provide/appoint counsel, or from a Fifth Amendment choice to request or retain counsel. Rather, its holding was "grounded in the understanding that 'the **assertion** of the

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[5] In **Patterson** the Court held that the waiver analysis of the right to counsel is essentially the same, regardless of whether that right emanates from a pre-indictment Fifth Amendment invocation of counsel, or a post-indictment Sixth Amendment right.

right to counsel [is] a significant event,'" 106 S.Ct. at 1410-11, citing and quoting **Edwards v. Arizona**, *supra*, and **Maine v. Moulton**, *supra*.

Under the teachings of these subsequent cases, once a criminal target is represented by counsel, there is no difference for Sixth Amendment "effectiveness" purposes between counsel retained by the defendant himself and counsel appointed to represent an indigent defendant. **Cuyler v. Sullivan**, 464 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)(a person is not foreclosed from asserting an ineffective assistance claim merely because he hired the lawyer in question).[6]

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[6] In addition to the distinction between defendants with retained vs. appointed counsel, some of the older cases also distinguished between adjudications of guilt vs. guilty pleas. That distinction, too, is no longer of any constitutional significance. **Hill v. Lockhart**, 474 U.S. 52, 106 S.Ct. 366, 369-71, 88 L.Ed.2d 203 (1985)(ineffective assistance of counsel can vitiate guilty plea).

The application of these principles to the case at bar is simple. Once Peeler exercised her constitutionally mandated[7] right to hire counsel, the government was obliged to use that lawyer as the "essential medium" to convey the offer of immunity. Prosecutor Alexander could not call Carol Peeler directly to offer her immunity. And when that lawyer chose to sacrifice his client's liberty out of "loyal[ty] to the others", his constitutional deficiencies are necessarily imputed to the government itself. **Kimmelman v. Morrison**, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) That would be so even if the government was not aware of the ineffective assistance. But, *a fortiori* is it so where, as here, the prosecutor and other government officials were aware in early 1986, shortly after the offer was made, that Jordan failed to convey the offer of immunity; but Peeler

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[7] In addition to the Fifth and Sixth amendments, the contract clause of the Constitution also confers an inalienable right to hire a lawyer.

herself did not become aware until April of 1989, three days after she plead guilty to a technical *malum prohibitum* offense on the advice of the same law firm.

B. Peeler Is Also Entitled to Relief under the Fifth Amendment. As we have seen, the Fifth Amendment also obligates the government to "honor, respect and preserve" the role of counsel as the "essential medium" for communications between the government and the accused. **Edwards v. Arizona**, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); **Patterson v. Illinois**, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

Correlative to the government's obligation to respect the role of defense counsel, counsel also has a duty to render constitutionally effective representation. The Fifth Amendment guarantee of due process, like the Sixth Amendment, also safeguards this right. Therefore, ineffective assistance claims are also cognizable under this

Amendment. **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed. 821 (1985) is a due process "ineffective assistance" case. It holds that **due process** requires a criminal defendant to have effective assistance of counsel on his first appeal as of right. It, thus, affirmed the granting of the Great Writ. In **Evitts** the Court was confronted with an argument by the state of Kentucky that is extremely analogous to the reasoning of the courts below. Kentucky argued that, because the Constitution does not require a state to have any system of appeals as of right in the first instance, then the fact that a defendant might get ineffective representation in the course of the gratuitous appeal that is present is inconsequential. The Court rejected this argument resoundingly because it recognized that **due process** was a broader concept which required courts to take the situations as they were presented to them and make sure that they

comported with the requirement for fundamental fairness. *Id.* at 838-39.

The lesson of **Evitts** is clear: if the state has an appeal (even one that is not constitutionally required), **due process** requires counsel to be effective in handling that appeal; similarly, because Peeler had a lawyer (regardless of whether or not the government was obliged to appoint one to represent her at this juncture), due process required him to be loyal and effective. If he is not, his ineffectiveness is imputed to the government. Or, to reiterate it in the words of **Maine v. Moulton**, 474 U.S. 159, 106 S.Ct. at 484, 88 L.Ed.2d 481 (1985), once Peeler had chosen to have counsel, the government was constitutionally obliged to "honor, . . . respect and preserve" her choice.

Several times during the course of the **Evitts** opinion, the Court analogized the plight of Lucey to "one who has no counsel at all." *Id.* at 836; also, 835n.6. Its reasoning was

that, if the benefits which a person received from his representation were really not much better than a person who had "no counsel at all", then the person is entitled to relief under the Constitution. Ironically, the facts in the case before this Court graphically illustrate that Carol Peeler would have been much better off if she had had "no counsel at all", because then the prosecutor would have been ethically obliged to communicate the immunity offer directly to Peeler and she would have then been aware that she had been offered a reasonable and expedient exit from the criminal process. She could have made her own decision. And, as the record evidence indicates, she would have accepted the offer, conditioned, as it was, only on her willingness to tell the truth. For this reason the Court of

Appeals erred in not even reaching the Fifth Amendment argument.[8]

C. Jordan's Deficient Representation Prejudiced Peeler.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), establishes the twin prongs for substantive analysis of the ineffective assistance claim. There is little dispute[9] about whether or not the record facts satisfy both prongs of the test.

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[8] The Fifth Circuit refused to address Peeler's Fifth Amendment argument because her pleadings and briefings did not differentiate between the Fifth and Sixth amendment arguments until she filed her objections to the Magistrate's report and recommendation. Contrary to the panel's opinion, this was properly before the district court because 28 U.S.C. §636(b)(1) provides for *de novo* review.

[9] In some cases there would be a need to remand for an evidentiary hearing to decide two fact issues: (i) whether or not the immunity offer was made, and (ii) whether it was communicated to Peeler or not. There is no need for an evidentiary hearing in this case because both points are established by the prosecutor's own testimony. AUSA Alexander testified that he made the offer, and also that he learned shortly thereafter that it had not been communicated to Peeler. His testimony about the offer being made was corroborated by two IRS agents who heard him make the offer, and his testimony about the lack of communication was readily admitted by Jordan himself.

First, both prosecutor Alexander and defense counsel Jordan have testified that the standard of reasonable representation would require communication of an immunity offer. So deficient representation is established as a matter of fact. Even absent this testimony, however, it would likely be established as a matter of law under the holdings of this Court. In **Strickland** itself the Court acknowledged that the professional norms for defense counsel include a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. at 2065.

Similarly, the prejudice component is established.[10] In **Strickland** the Court observed that there are some

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[10] The test of prejudice is still the same. As Justice O'Connor pointed out in her concurring opinion in **Lockhart v. Fretwell**, ____ U.S. ____, 113 S.Ct. 838, 845, 122 L.Ed.2d 180 (1993) "[t]he determinative question [under **Strickland**] -- whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' -- remains unchanged."

circumstances which are so inherently prejudicial that, when shown, prejudice is **conclusively presumed**. One such circumstance is to show a **conflict of interest** that affected counsel's performance. The reason that this species of ineffective assistance is so pernicious is

> [i]n those circumstances counsel breaches the **duty of loyalty, perhaps the most basic** of counsel's duties.

Id. 104 S.Ct. at 2067. Accord **Cuyler v. Sullivan**, 464 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Again, the facts of this case squarely meet this component of the **Strickland** test. The reason that Darrell Jordan failed to pursue immunity for Carol Peeler in a timely manner -- according to Mr. Jordan's own admission to reporter Sally Giddens -- was that

" we were remaining loyal to the other people".

(Deposition of Sally Giddens, **quoting Darrell Jordan.)**

Thus, if this Court truly meant what it said in Michigan v. Jackson, *supra*, when it wrote that "'the **assertion** of the right to counsel [is] a significant event,'" which must be "honored", "respect[ed] and preserve[d]" then Peeler's conviction must be overturned.

II. THE FIFTH CIRCUIT'S HANDLING OF THE CASE ALSO VIOLATES DUE PROCESS

Peeler would prefer that this Court accept certiorari on the substantive constitutional merits of her ineffective assistance claims and avoid this issue altogether. However, because the Fifth Circuit's[11] handling of her appeal "has so far departed from the accepted and usual course of judicial proceedings" Rule 10.1(a), S.Ct.R., Peeler would be remiss if she did not point out this defect to the Court and ask, as an alternative remedy, that this Court reverse the opinion of

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[11] This point of error is brought most reluctantly. The undersigned counsel began his legal career as a law clerk for the late John R. Brown, then Chief Judge of the Fifth Circuit. Consequently, he has a great appreciation for the legacies of that great court and some understanding of the burdens which face the judges of that court. The Fifth Circuit's long-standing summary calendar procedures are a necessary and important tool for assisting the court in its workload. On the other hand, the reason that it has worked well for the Court is that the Court itself has been scrupulously sensitive to the procedural regularity of summary disposition without oral argument. It has assigned screening cases to all active judges "selected in rotation" and has "carefully separated" the functions of judge assignments and calendaring of cases.

the court below and remand the case for reconsideration by a randomly chosen panel.

In accordance with the "screening" procedures employed by the Fifth Circuit this case was originally scheduled for oral argument. This means that at least one of the three judges on the screening panel thought that the case merited oral argument. However, unbeknownst to Peeler, apparently one of the judges on the oral argument panel decided *sua sponte* to recuse himself from the oral argument panel. The other two judges on the panel then instructed the clerk to advise counsel that the case would be decided on the briefs without argument. On November 9, 1993, the remaining two judges issued an unpublished, per curiam opinion affirming the denial of relief. A footnote to this opinion indicates that these two judges decided the case as a quorum of the scheduled oral argument panel under the ostensible authority of 28 U.S.C. §46(d). Peeler filed a

Motion for Rehearing arguing that summary disposition by a two judge court without oral argument was violative of Rule 34, Fed.R.App.P. On December 29, 1993, the panel granted the Motion and vacated its opinion, ordering that "the case will be resubmitted to a three-judge panel".

At this point justice and due process required the complete reassignment of the case to another panel of judges who had not already made up their minds about the substantive issues in the case -- either a new, standard screening panel, or a regularly scheduled oral argument panel.

The reason for this is clearly stated in the Fifth Circuit's Internal Operating Procedures:

> **To insure complete objectivity** in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignment to panels and (2) calendaring of cases are **carefully separated**.

That was not done. The Fifth Circuit clerk's office advised Peeler's counsel that the third member of the panel was specifically requested by the junior judge on the original panel to participate in the resolution of this case.[12] The result is the reissuance of the same, per curiam, unpublished opinion previously rendered by the ostensible two judge quorum.

Peeler has been unable to find any reported opinion from this Court in which the constitutional implications of panel gerrymandering were considered. The only time known to counsel at which a judge of the Fifth Circuit was accused of such conduct was in Judge Cameron's scathing dissent in **Armstrong v. Board of Education**, 323 F.2d

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[12] Unfortunately this is not in the record and not available to Peeler's counsel. However, if the Court grants the writ on this issue, Peeler will request that this Court order the augmentation of the record by directing the clerk of the Fifth Circuit to forward to this Court the back page of the docket sheet and any internal memoranda regarding the selection of the panel which ultimately resolved the case.

333, 352-59 (5th Cir. 1963), cert. denied 376 U.S. 908 (1964), which hails from an extremely divisive period in the Fifth Circuit's history. Cf **Akins v. Texas**, 325 U.S. 398, 400n.1, 65 S.Ct. 1276, 1278n.1, 89 L.Ed. 1692 (1945).

However, there are reasonable analogies. For example, this Court has a long history of reviewing the selection process for **juries** to make sure that they were truly "impartial" and "indifferent". E.g. **Irvin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639 (1961). Is it any less important that the **judges** who are assigned to hear cases are chosen randomly and impartially, and that they come to the case with no preconceived notion? Of course not.

The deprivation of due process to Peeler is clear. Moreover, because this case involves a professional betrayal by a very highly visible Texas lawyer[13] and has attracted a

---

[13] The Court can take judicial notice that Mr. Jordan is the former President of the Texas Bar Association.

fair amount of media attention already, it not only jeopardizes justice in this case, but undermines public confidence in the procedures of the federal courts as a whole. Therefore, it cries out "for an exercise of this Court's power of supervision." Rule 10.1(a).

Conclusion

Since **Strickland** a host of ineffective assistance attacks have been launched -- usually by *pro se* prisoners who do not understand the stringency of the twin requirements of that case. Most have failed. One apparent reason for this is that **most** defense counsel are both competent and loyal. However, this is an extraordinary case. The well-documented motion for relief under §2255 demonstrates a blatant betrayal of the client's interests by a very highly paid defense lawyer, . . . and the government knew all about it.

A person accused of a crime has many forces aligned against him. All of the power of the government -- police and prosecutor -- are arrayed against him. Many times friends and family might turn against him. And the best that he can hope for from the bench is impartiality. But the Constitution contemplates that there is one person who will stand by him. There is one person in whom he could confide his sins and his fears with confidence that this information is protected from disclosure by a sacred privilege. There is one person from whom he could expect and require unswerving fidelity. There is one person who will interpose himself between the accused and the government and serve as the "essential medium" for communication between them. That person is the accused's lawyer. And the constitutional precedents of this Court unambiguously require the government to "honor, respect and preserve" the role and function of that person.

Carol Peeler hired such a person -- a former prosecutor turned prominent lawyer, bar politician and partner in a prestigious Dallas law firm. The government conveyed its offer of immunity to this "essential medium". He failed to tell her about it because he had a different agenda and conflicting loyalties. The government knew it; Peeler did not. Under these unique circumstances Peeler was denied constitutionally effective representation.

Only this Court can rectify that error. On the authority of the numerous opinions of this Court set forth herein, Peeler implores the Court to grant the writ of certiorari, and, after reviewing the merits to "**vacate and set the judgment aside and . . . discharge the prisoner**". 28 U.S.C. §2255.

Respectfully submitted

ARCHER, WALDNER & VICKERY

(Signed) Arnold Anderson Vickery

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PROOF OF SERVICE
CERTIFICATE OF SERVICE

Pursuant to Rule 29.3 of the Rules of the Supreme Court of the United States, I certify that three copies of the Petition for Writ of Certiorari has been served on Robert D. Lindsay, Chief, Criminal Division, Department of Justice - Tax Division, 10th & Constitution Avenue, N.W., Suite 4131, Washington, D.C. 20530 via first class postage prepaid, on this 4th day of May, 1994.

(Signed) Arnold Anderson Vickery

(2) Supreme Court, U.S.
FILED

NUMBER 93-1836 MAY 17 1994

IN THE OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

CAROL C. PEELER

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

Arnold Anderson Vickery
COUNSEL FOR PETITIONER
ARCHER, WALDNER
& VICKERY, L.L.P.
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Suite 2770
Houston, Texas 77019
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182 pp

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U.S. COURT OF APPEALS
FILED
NOV 09 1993
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1931

United States of America,

Plaintiff-Appellee

v.

Carol C. Peeler,

Defendant-Appellant

Appeal from the United States
District Court for the Northern
District of Texas
(3:92-CV-847-G (3:89-CR-028-G))

Before DAVIS, and JONES, Circuit Judges.***

PER CURIAM:

Defendant Carol Peeler was the president of Hillcrest Securities and the vice-president of Hillcrest Equities when the various Hillcrest entities came under investigation by the Internal Revenue Service in 1984. Peeler retained Darrell Jordan of the Hughes & Luce law firm to represent her in the ongoing investigation and any criminal and/or civil proceedings it might spawn.

In December 1985, Bill Alexander, an Assistant U.S. Attorney assisting the IRS in its investigation, allegedly offered Jordan transactional immunity for Peeler in exchange for her cooperation with the investigation.[1] Jordan did not inform Peeler of the offer and -- not surprisingly -- did not contact Alexander within the time stipulated. As a result, Alexander made the same offer to another Hillcrest principal

---

[1]Whether or not an offer of immunity was actually made is sharply disputed. In a related malpractice action still pending in state court, Alexander testified that the offer was clear and unequivocal, while Jordan testified that no such offer of immunity was made. The magistrate found it unnecessary to decide the factual disputes in denying defendant's motion for postconviction relief.

who immediately accepted. By late January 1986, Alexander's offer of immunity to Peeler had been withdrawn.

Peeler was indicted on January 31, 1989, and charged with one count of conspiracy to defraud the United States and seventeen counts of willfully aiding and assisting in the filing of false income tax returns. Pursuant to a plea agreement, Peeler pled guilty in March 1989 to a single count of willfully aiding and assisting in the filing of a false return. She was sentenced to probation for five years and fined $100,000.

In April 1992, Peeler moved for postconviction relief pursuant to 28 U.S.C. §2255 (1988) on the basis that Jordan's *preindictment* failure to inform her of the immunity offer deprived Peeler of her Sixth Amendment right to effective assistance of counsel. Upon reference from the district court, the magistrate judge issued a report

recommending that the requested relief be denied. The magistrate judge concluded that Peeler had no right to counsel prior to indictment and thus could have no right to effective assistance prior to that date. The district court adopted the magistrate judge's findings and conclusions and denied the motion; from this denial Peeler appeals. Our de novo review leads us to affirm the district court's denial of postconviction relief.

It is well-established that where there is no constitutional right to counsel there can be no deprivation of effective assistance. Wainwright v. Torna, 455 U.S. 586, 587-88 (1982). The relevant inquiry then becomes whether Peeler had a Sixth Amendment right to counsel over three years prior to her indictment. However, a defendant's right to counsel attaches only once adversary *judicial* proceedings are initiated against her. See Kirby v. Illinois, 406 U.S. 682, 688 (1972). The district court properly concluded that

adversary judicial proceedings did not commence until January 31, 1989, when Peeler was indicated.[2] Even taking as true all of Peeler's allegations, she has failed to state a claim for deprivation of effective assistance of counsel since she had no constitutional right to counsel prior to indictment.

On appeal, Peeler also seeks relief on the basis that Jordan's failure to inform her of the immunity offer constituted a deprival of due process under the Fifth Amendment. We need not reach the merits of this independent basis for relief since Peeler raised this argument for the first time in her objections to the magistrate's report. Because the due process argument was not properly before the district court, this court will not address it. See United States v. Armstrong, 951 F.2d 626, 630 (5th Cir. 1992).

---

[2]Adversary judicial criminal proceedings may be initiated through formal charge, preliminary hearing, indictment, information or arraignment. See McNeil v. Wisconsin, 111 S.Ct. 2204, 2207 (1991).

For the foregoing reasons, we **AFFIRM** the district court's ruling.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

**One of the judges of the panel recused himself following the calendaring of the case for oral argument to the panel. The case is being decided by a quorum. 28 U.S.C. 46(d).

U.S. COURT OF APPEALS
FILED
DEC 29 1993
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1931

United States of America,

Plaintiff-Appellee

v.

Carol C. Peeler,

Defendant-Appellant

Appeal from the United States
District Court for the Northern
District of Texas

(3:92CV-847-G(3:89-CR-028G))

(ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC)

Before DAVIS, and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is GRANTED, the quorum opinion is vacated, and the case will be resubmitted to a three-judge panel.

U.S. COURT OF APPEALS
FILED
JAN 19 1994
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1931

United States of America,

Plaintiff-Appellee

v.

Carol C. Peeler,

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Appeal from the United States
District Court for the Northern
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recommending that the requested relief be denied. The magistrate judge concluded that Peeler had no right to counsel prior to indictment and thus could have no right to effective assistance prior to that date. The district court adopted the magistrate judge's findings and conclusions and denied the motion; from this denial Peeler appeals. Our de novo review leads us to affirm the district court's denial of postconviction relief.

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For the foregoing reasons, we **AFFIRM** the district court's ruling.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S. COURT OF APPEALS
FILED
JAN 19 1994
Charles R. Fulbruge III
Clerk

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR -2 1994
NANCY DOHERTY, CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1931
(Summary Calendar)

United States of America,

Plaintiff-Appellee

v.

Carol C. Peeler,

Defendant-Appellant

Appeal from the United States
District Court for the Northern
District of Texas

Before DAVIS, JONES and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

January 19, 1994

ISSUED AS MANDATE: FEB 28 1994

U.S. COURT OF APPEALS
FILED
FEB 16 1994
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1931

United States of America,

Plaintiff-Appellee

v.

Carol C. Peeler,

Defendant-Appellant

Appeal from the United States
District Court for the Northern
District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 19, 1994, 5 Cir., , F.3d)
(February 16, 1994)
Before DAVIS, JONES and DUHE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge
Judge Higginbotham did not participate in the consideration of the suggestion for rehearing en banc.
REHG-6

NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 15 1992
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION -- HON. A. JOE FISH)

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

DEFENDANT'S MOTION FOR §2255 RELIEF

NOW COMES Carol C. Peeler, Defendant, by and through her undersigned counsel, and moves the Court pursuant to 28 U.S.C. §2255 to vacate the September 6, 1989, Judgment of conviction and Sentence (Exhibit 30), and to dismiss the indictment and all charges against her.

Request for Personal Consideration by Judge Fish

Defendant/Movant Peeler realizes that the Court has a significant workload and that sometimes matters of this nature are referred to the U.S. Magistrate for evidentiary hearings. However, in view of the Court's familiarity with this case, including its handling of several related cases to include one jury trial which resulted in an acquittal, and the degree to which the evidence has already been marshalled, Peeler respectfully requests that this matter be personally considered by United States District Judge Fish.

Introduction

As explained in the following paragraphs, the basis of this request is that Defendant Peeler has been deprived of her constitutional right to **effective assistance of counsel,** in that her counsel failed to apprise her of the fact that, prior to her indictment, the government offered **immunity from prosecution** to her. If her counsel had rendered constitutionally effective representation, Peeler would not

have been -- and should not have been -- indicted. Thus, this Motion does **not** contravene either the facts or the legal position taken by Peeler in her plea agreement. Rather, the gist is that she should never have been in the position to have to enter into a plea agreement. Specifically, Defendant would show the Court the following:

Source of Proof -- State Court Malpractice Case

1. There are 30 Exhibits to this Motion. The majority of them are taken from discovery or investigative materials in the state court, legal malpractice case styled as Carol Peeler v. HUGHES & LUCE, and Darrell Jordan, currently pending in the 116th Judicial District Court, Dallas County, Texas, under cause No. 91-00657-F. An index to these Exhibits is contained at the end of this Motion and also in the separate Exhibit Volume.

2. Status of State Court Malpractice Case. As the exhibits to this Motion reflect, much discovery has been

completed in the state court case. The case was specially set for trial on February 24, 1992.[1] In November 1991 the Defendants moved for summary judgment. On January 18, 1992, that Motion was denied. However, on February 10, 1992, on Motion for Reconsideration, Judge Frank Andrews granted the defense motion on two specific grounds: (1) that Ms. Peeler's acknowledged guilt in her plea agreement in this Court constitutes the **proximate cause** of any damages that she claims, and (2) "PEELER DID NOT ATTEMPT TO **WITHDRAW HER PLEA OR HAVE HER CONVICTION SET ASIDE**". Exhibit 1 below is a copy of excerpts of the relevant portions of defendant's motion for summary judgment in the state court case and Exhibit 2 is

---

[1] At the urging of Peeler's counsel the case did go to mediation. H&L's counsel and carrier realized the obvious seriousness of Peeler's claims and offered $350,000 (slightly less than the total fees received by H&L to date for representing Peeler) to settle those claims. For a number of reasons, including the fact that the IRS has a $2MM lien on Peeler's lawsuit, the case could not be settled in this range, and negotiations stalled.

the Amended Order Granting Summary Judgment and specifying the bases for the court's ruling. Peeler's Motion for Reconsideration/New Trial is currently set for hearing before Judge Andrews on May 4, 1992.

3. Frankly, HUGHES & LUCE's [hereinafter H&L] state court arguments about the necessity of seeking relief from this Court prior to pursuing a legal malpractice case seemed to be putting the cart before the horse. It had seemed that it would make more sense to fully investigate, discover and litigate the factual disputes pertaining to the immunity offer (Ms. Peeler's former counsel Darrell Jordan continues to dispute the fact that the offer was made) prior to seeking such relief, so that this Court would have a fully developed record. However, in view of Judge Andrews' recent ruling in the state court litigation it is clear that that case has been as fully developed as it is likely to be in the

immediate future, and that this Motion must be pursued at this juncture.

Elements of the §2255 Claim for Relief

4. The federal habeas corpus statute provides, in relevant part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. §2255. Peeler satisfies the requisites of this statute and is entitled to relief.

Custody Requirement

5. Peeler is, by virtue of her probation, "in custody". Habeas corpus[2] is a remedy directed at custody. However, a person who is serving a federal sentence which includes probation is "in custody" within the meaning of §2255. **Addison v. United States**, 589 F.2d 252 (5th Cir. 1979). See 18 U.S.C. §3651; Rule 32, Fed.R.Crim.P. See generally **Jones v. Cunningham**, 371 U.S. 237, 83 S.Ct. 373, 9 L.Ed. 2d 285 (1963), and **Carafas v. LaVallee**, 391

---

[2] Section 2255 is a federal statutory analogue to the Great Writ of the Constitution. Because this is a distinction without difference or significance in the context of this Motion we will use the terms or concepts interchangeably.

With regard to the "in custody" requirement, even if Peeler were not in custody, the fundamental nature of her constitutional deprivation and the continuing consequences to her of her conviction would entitle her to coram nobis relief. United States v. Bruno, 903 F.2d 393 (5th Cir. 1990).

U.S. 234, 238, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968). Peeler was sentenced on September 6, 1989, to a five year term of probation and is, thus, still in custody and entitled to seek §2255 relief.

THE CASE LAW

Standards for Evaluating **Ineffective Assistance** Claims

6. Peeler's constitutional rights have been abridged because of **ineffective assistance of counsel**. It is an elementary concept that a person is entitled under the Sixth Amendment to **effective** assistance of counsel in order to protect the fundamental right to a fair trial. **United States v. Cronic**, 466 U.S. 2039, 104 S.Ct. 2039, 2043-46, 80 L.Ed.2d 657 (1984); see generally **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Numerous cases[3] establish that infringement of that right is

[3] Due to the enormous number of reported ineffective assistance cases – most of which are factually inapposite – we have tried to limit our citations of authority mainly to those Supreme Court decisions which establish the indisputable analytical framework for this Motion.

a violation of the accused's constitutional rights. Although there was some confusion in some of the older cases pertaining to the availability of habeas relief to a person who **pled guilty** and/or to a person who was represented by **retained** -- as opposed to court-appointed -- counsel, the law in this area is now clear. **Cuyler v. Sullivan**, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)(defendant is constitutionally entitled to effective assistance of **retained** counsel); **Hill v. Lockhart**, 474 U.S. 52, 106 S.Ct. 366, 369-71, 88 L.Ed.2d 203 (1985)(ineffective assistance of counsel can vitiate guilty plea). Thus, whether counsel is retained or appointed, and whether the defendant is convicted at trial or pleads guilty, because of the fundamental nature of the right to effective counsel, if the facts and circumstances show (i) that there was deficient representation, and (ii) that the defendant was prejudiced by

that deficiency, then the ineffectiveness is imputed to the Government, and the conviction must be overturned. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2585, 91 L.Ed.2d 305 (1986); Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed. 821 (1985).

7. This two pronged analysis was established in the lead case, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the United States Supreme Court held that, in order to make out an ineffective assistance case, the petitioner must allege and prove the following:

> First, the defendant must show that counsel's **performance was deficient**. . . .
>
> Second, the defendant must show that the deficient performance **prejudiced the defense**. . . . [In other words] [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, **the result of the proceeding would have been different.**

104 S.Ct. at 2064, 2068 (emphasis added). Peeler's circumstances satisfy that test.

8. With regard to the deficiency component, the Court held that "[t]he proper measure of attorney performance remains simply **reasonableness under prevailing professional norms.**" Ordinarily, this would require evidence or judicial notice about prevailing norms or standards of reasonableness. However, the Court delineated "certain basic duties", the violation of which would be a clear deviation from accepted standards of effective or reasonable representation. They include the following which is extremely germane to this case:

> From counsel's function as assistant to the defendant derive the **overarching duty** to advocate the defendant's cause and the more particular duties **to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.**

Id. at 2065. Obviously, the failure to communicate an offer of immunity from all prosecution violates this basic duty. See **United States v. Plewniak**, 947 F.2d 1284, 1289 (5th Cir. 1991)(affirming district court's denial of §2255 relief because prosecutor's letter "was not an offer of immunity, so Mr. Greenman's failure to communicate the contents of the letter did not constitute ineffective assistance of counsel.").

9. Indeed, those few courts which have considered the matter have even held that "[t]he decision to reject a plea bargain offer and plead not guilty is a decision for the accused to make. It would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards." **United States ex.rel. Caruso v. Zelinsky**, 689 F.2d 435, 438 (3rd Cir. 1982). See **Diaz v. United States**, 930 F.2d 832, 834 (11th Cir. 1991)("Counsel has an

obligation to consult with his client on important decisions"; but here defendant was told about plea bargain offer); accord **Johnson v. Duckworth**, 793 F.2d 898, 901-02 (7th Cir. 1986)("defense attorneys have a duty to inform their clients of plea agreements proffered by the prosecution, and that failure to do so constitutes ineffective assistance of counsel under the sixth and fourteenth amendments. Apart from merely being informed about the proffered agreement, we also believe that a defendant must be involved in the decision-making process regarding the agreement's ultimate acceptance or rejection."). Obviously, if the failure to apprise a client about a plea bargain offer constitutes ineffective assistance, then, a fortiori, the failure to communicate an offer of complete prosecutorial immunity must be totally ineffective assistance. See **United States v. Plewniak**, supra.

10. As to the prejudice component, ordinarily the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068. But, as with the deficiency analysis, there are some circumstances which are so inherently prejudicial that, when shown, prejudice is conclusively presumed. One such circumstance is to show a **conflict of interest** that affected counsel's performance. **Cuyler v. Sullivan**, supra 100 S.Ct. at 1719. The reason that this species of ineffective assistance is so pernicious is that

> [i]n those circumstances counsel breaches the **duty of loyalty, perhaps the most basic** of counsel's duties.

Strickland v. Washington, supra 104 S.Ct. at 2067. Again, the facts of this case squarely satisfy this component of the test and warrant a **presumption** of prejudice. The

reason that Darrell Jordan failed to pursue immunity for Carol Peeler in a timely manner -- according to Mr. Jordan's own admission to reporter Sally Giddens -- was that

" . . . **we were remaining loyal to the other people**". Exhibit 10, Deposition of Sally Giddens, **quoting Darrell Jordan**, at p.54 ; and Exhibit 11, handwritten notes of Ms. Giddens' conversations with Mr. Jordan. Thus, prejudice should be presumed from the conflict.

11. But even if it were not, the facts of this case indisputably establish prejudice. The test of prejudice under **Strickland** is simple and straight-forward. All the Court must do is consider the undisputed facts, and evidence, and ask the simple question:

> Do the facts show "that there is a reasonable **probability** that, but for counsel's unprofessional errors, **the result of the proceeding would have been different.**"

104 S.Ct. at 2068 (emphasis added). As shown below, there would clearly have been a difference in Peeler's case if her

lawyer told her that the Government was willing to give her immunity.

THE FACTS

Ineffective Assistance by Jordan/H&L

12. The Immunity Offer Was Made. In December 1985, the United States Government, acting through then Assistant U.S. Attorney William Alexander (a prosecutor with many, many years of prosecutorial experience[4] at the state and federal levels) made an unambiguous, unequivocal,[5] offer of immunity to Carol Peeler. The offer

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[4] Mr. Alexander is an officer of the court. This Court is undoubtedly familiar with Mr. Alexander's background. He has been licensed to practice law in Texas since January 1942. His career as a prosecutor has included such cases as the prosecution of Jack Ruby for shooting Lee Harvey Oswald. He served both in the Dallas County District Attorney's Office and in the United States Attorney's Office.

[5] We emphasize this fact because Mr. Jordan has apparently tried to persuade Alexander to equivocate about the immunity offer. In June 1989, shortly after the question of the immunity offer was publicized by "D" Magazine in the article authored by Ms. Giddens, Jordan arrived unannounced at Bill Alexander's office. Both men agree that this meeting took place. Exhibit 9, Jordan Depo. at pp. 87-88. Alexander testified that "A summary of it would be that he wanted me to say either

was made via telephone call. According to the deposition testimony of Alexander, he told Jordan that "I would offer her immunity from the beginning of time to the end of the world as concerned the Hillcrest Securities activities." Exhibit 3, Alexander Deposition at pp. 17-18. Subsequently, Alexander confirmed again that the offer was made. His Affidavit, Exhibit 4, states it as follows:

> The IRS personnel in charge of the case and I wanted one of the Hillcrest principals to cooperate with the government and tell the truth about what had happened at Hillcrest. We were willing to give that person immunity to secure their cooperation. Based on our investigation, we believed that Carol Peeler and David "Buzz" Tompkins both had information which could be useful to the government and we decided to offer immunity to one of them in exchange for their

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orally to somebody or in writing that my offer of immunity was so vague that he may not have understood that it was a letter – that it was an offer of immunity, and that he really thought that I was just inviting her to appear before the grand jury without a subpoena." Alexander responded, "Can't do it, Darrell. I know what I offered you. I'm not backing up a bit." Exhibit 3, Alexander Depo. at pp. 29.

cooperation. **Our first choice was Carol Peeler.**

On or about December 1-3, 1985, I made a definite, unambiguous offer of transactional immunity[6] regarding all Hillcrest matters to Darrell Jordan, the attorney for Carol Peeler. Specifically, as best I recall, I advised Mr. Jordan that the government was willing to "forgive all of Ms. Peeler's sins regarding the Hillcrest matter from the beginning of the world until the end of time" in exchange for her cooperation. The immunity offer extended to Ms. Peeler's husband as well, and **would have prevented both of them from being indicted or prosecuted had Mr. Jordan communicated Ms. Peeler's acceptance of the offer to me.**

. . . **I am sure that, if Darrell Jordan had told me that Carol Peeler accepted my offer of immunity, she would have received immunity.**

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[6] What former AUSA Alexander offered to Peeler/Jordan, was complete, total transactional immunity. It, thus, contrasts sharply with the letter at issue in United States v. Plewniak, 947 F.2d 1284, 1289 (5th Cir. 1991), which the Fifth Circuit said was "not specific enough to be characterized as an 'offer' at all".

13. Alexander's testimony and affidavit are corroborated by the testimony and affidavit of the two IRS agents who **heard him make the offer** -- one of whom actually placed the call to Jordan's office. IRS Criminal Investigative Agent Ernesto Hernandez testified by written and oral deposition that in Alexander's phone conversation with Darrell Jordan he basically said,"...we're making an offer of immunity." And that, "Bill's words, to my recollection, were, from the beginning of time to the end of time. I mean, it just encompasses the whole wagon, the whole nut." Exhibit 6, Hernandez Oral Deposition at p. 64. See also Exhibit 5, Hernandez Deposition on Written Questions.

14. Similarly, Revenue Agent Paul Michael Smith -- the man who began the Hillcrest investigation, referred the matter for criminal investigation, and remained actively involved throughout the proceedings -- has executed an

Affidavit, and testified on deposition that the offer was definitely made. His Affidavit states it as follows:

> In late 1985 or early 1986 I was present in our grand jury office, along with CID agent Ernesto Hernandez, when Mr. Alexander spoke to Darrell Jordan on the telephone and communicated the government's offer of immunity. As I recall it, Mr. Alexander said something to the effect that the government would "forgive it all" if Carol Peeler would "come in and cooperate." He also specifically advised Mr. Jordan that this was a one time offer which would not be made again.

Exhibit 7, Smith Affidavit. See also Exhibit 8, Smith Oral Deposition at p. 64.

15. The government had good reasons for making Carol Peeler its first choice for immunity. Alexander wanted her because he expected that she could save the Government considerable time and expense in its investigation and prosecution. Exhibit 3, Alexander Deposition at pp. 17-18, 40. On the other hand, Revenue Agent Smith, the man who began the Hillcrest investigation,

although agreeing that the government hoped that Ms. Peeler's cooperation would expedite its investigation, has stated that she was also the government's choice because "we **did not feel like she was instrumental** in setting up the tax shelter scheme because she was not even employed by the company at its inception. In my opinion, **Ms. Peeler had been used** by the other principals to give the program more credibility." Exhibit 7, Smith Affidavit.

16. The Government's second choice for immunity was David "Buzz" Tompkins. When Jordan failed to get back to AUSA Alexander, the Government then made the offer to Tompkins' attorney who accepted "quickly". Exhibit 4, Alexander Affidavit at para. 7. The grant of immunity was confirmed in a letter agreement between the Government and Tompkins. Exhibit 18. Alexander had obtained the form language for this letter from the DoJ Tax Division, and has indicated that he would have used the

same steps and the same letter to grant immunity to Peeler if Jordan had gotten back to him. Exhibit 4, Alexander Affidavit at paras. 8-9.

Strickland's First Prong:

Peeler's Lawyer Darrell Jordan Gave Her Deficient Representation

17. Jordan Failed to Communicate the Immunity Offer to his Client. Darrell Jordan has admitted in sworn testimony in the state court litigation that an effective or reasonable defense lawyer should communicate an offer of immunity to his client, and he has also admitted that he did not communicate any offer of immunity to Carol Peeler. His explanation -- in a deposition which was taken prior to the time that Alexander's testimony was corroborated by Hernandez and Smith -- is that the offer simply did not happen:

Q. NOW, YOU WERE HERE FOR THE DEPOSITION OF BILL ALEXANDER YESTERDAY, WERE YOU NOT?

A. YES, I WAS.

Q. DO YOU AGREE WITH MR. ALEXANDER THAT AN ATTORNEY WHO RECEIVES AN OFFER OF IMMUNITY FROM A PROSECUTOR IS OBLIGED TO COMMUNICATE THAT OFFER TO THEIR CLIENT.

A. I CERTAINLY DO.

Q. THAT IS THE REASONABLE THING TO DO; IS IT NOT?

A. IT IS.

* * *

Q. DO YOU ALSO AGREE WITH MR. ALEXANDER THAT THE DECISION AS TO WHETHER TO ACCEPT OR TO REJECT IMMUNITY IS THE CLIENT'S DECISION, NOT THE LAWYER'S?

A. I AGREE WITH THAT AS WELL.

* * *

Q. OKAY. NOW, DID YOU EVER COMMUNICATE TO CAROL PEELER

ANY OFFER OF IMMUNITY FROM THE UNITED STATE'S ATTORNEY'S OFFICE?

A. **NO, I DID NOT.**

Q. WHY NOT?

A. **BECAUSE I DIDN'T RECEIVE ONE.**

Q. OKAY. SO YOU ARE TELLING ME THAT MR. ALEXANDER WAS NOT TELLING THE TRUTH YESTERDAY WHEN HE SAID THAT HE MADE YOU A VERY CLEAR, DEFINITE OFFER OF IMMUNITY?

A. **UNEQUIVOCALLY, I AM TELLING YOU THAT THE CONVERSATION MR. ALEXANDER DESCRIBED YESTERDAY DID NOT OCCUR.**

Exhibit 9, Jordan Deposition at pp. 7-9.

18. Although there is an obvious factual dispute concerning the question of whether or not an immunity offer was made between Darrell Jordan on the one hand, and Alexander, Hernandez, Smith and two other independent

witnesses[7] on the other -- one of whom is a long-standing member of the bar who specifically recalls Jordan **admitting to him** that Peeler was offered immunity before Tompkins -- there is **no dispute** about the fact that Jordan did not communicate an offer of immunity to Carol Peeler. And, for purposes of this Motion, the United States Government is bound by the testimony of the three **government agents**, regardless of what Mr. Jordan may say. Thus, the "deficient" or unreasonable representation component of the **Strickland** test is established.

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[7] Jordan's testimony is also contradicted by admissions he himself made to third party witnesses. One witness is Dallas attorney Paul Wright, whose deposition was taken on October 28, 1991. Mr. Wright has been practicing law for over 28 years in Dallas, and, for many years was a partner in the prestigious Dallas firm of Jackson & Walker. He was also President of the Dallas Harvard Club. He testified that, on August 11, 1988, he discussed the Hillcrest case with Darrell Jordan in the Toronto airport and that he was advised by Jordan that the government offered immunity to Carol Peeler before Buzz Tompkins, but that "Carol didn't want to take it". Mr. Wright stated that there was no doubt in his mind about this conversation. Exhibit 16, Wright Depo. at pp. 25-29. The other witness is reporter Sally Giddens whose testimony is discussed elsewhere in this Motion.

Strickland's Second Prong:

Jordan's Deficiency **Prejudiced** Peeler

19. PRESUMPTIVE PREJUDICE: Jordan Sold His Client Down the River. Although habeas courts do not necessarily have to consider the motives of a lawyer who renders ineffective assistance, as the **Strickland** case demonstrates, in the search for prejudice it is important to know whether counsel's actions resulted from a conflict of interest because such a conflict gives rise to a **presumption of prejudice**. And so we ask. Why would Jordan or any lawyer fail to communicate an offer of immunity to a client? The answer lies in a joint defense stratagem known as the "GIDEON INITIATIVE".

20. To put this matter in perspective, it is necessary to give some background information on the overall Hillcrest investigation and prosecution. When Government began its investigation, its theory was that the

entire Hillcrest trading program was a facade or sham. This theory rested on the information which it had received as part of a plea bargain with admitted-felon-turned-informant Ed Markowitz.

21. Hillcrest's substantive defense included evidence that its trades had been audited and confirmed by Alexander Grant, a major accounting firm. To present that defense, at the inception of the Hillcrest investigation, the principals and their counsel all entered into a joint defense pact. Exhibit 24, Joint Defense Agreement. Jordan was a signatory to this agreement. The defense lawyers' approach was to create a stone wall, or "dike" which the Government would have to breech, and, while they were staving off prosecutorial efforts, to work behind the scenes towards a panacea solution.

22. Thus, in November of 1985 -- the month before the immunity offer was made to Peeler/Jordan, the

attorneys on the joint defense team hired Ken Gideon, former chief counsel of the IRS and then a partner at Fulbright & Jaworski, to try to negotiate a global deal for civil fines and cooperation with the Department of Justice. Exhibit 12 is a copy of notes from the defense attorneys' meeting with Gideon. Exhibit 15 are excerpts from the Written Deposition of Mr. Gideon concerning his efforts. To give Gideon's efforts a greater chance of success, it was important to defense counsel that prosecutor Alexander not perceive any loose stones in the wall or "cracks in the dike".

23. Jordan's decision not to communicate the offer of immunity to his client is directly related to the joint defense team's GIDEON INITIATIVE. How do we know this? Three ways. First, on December 22, 1985, H&L attorney Kim Askew prepared a memorandum to Darrell Jordan entitled Brainstorming Memo on Issues Relating to Joint Defense Privilege. It specifically addresses

withdrawal from the joint defense agreement "if any party enters into an agreement to act or testify as a witness on behalf of any State or federal agency." Exhibit 13, p.2. It is strong contemporaneous proof that immunity for Carol Peeler was in the offing and that H&L was focusing its attentions on the implications to the other defendants and their law firm of Carol Peeler becoming a government witness.

24. Second, less than a month later, on January 21, 1986, Ms. Askew and another H&L attorney, David O'Connor prepared another memo to Mr. Jordan to address the "options" available for the defense of Carol Peeler. The first option is the "Gideon Initiative"; option two was "immunity". Exhibit 14. The H&L attorneys explained to Mr. Jordan that, in order to give Gideon a chance to negotiate the civil deal, they had to make sure that AUSA

Alexander did not perceive any "cracks in the dyke"[sic].[8] They concluded their advice as follows:

> Putting all this together, it seems to us that we ought to **wait some reasonable additional** period to see whether the Gideon initiative will bear fruit, and **then pursue** the matter [of immunity] with Bill Alexander. The **risks of doing so are** that Bill will find another **crack in the dyke**, or develop additional harmful information on Carol.

Exhibit 14, January 21, 1986, memorandum at p. 026641. This memorandum is also strong contemporaneous evidence of the fact that the offer had been made -- or at least that immunity was a live and viable option for Carol Peeler at that time. Moreover, the memorandum further indicates that

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[8] By the time Gideon went to Washington Alexander was already involved in negotiations with Tompkins' attorneys, i.e. he had already found another "crack in the dike". Therefore, when the DoJ attorneys called him to tell him that someone was attempting to end run the prosecution of this case, he told them "don't jerk this case out from under me. It's too good." Exhibit 3, Alexander Depo. at p. 23.

the H&L attorneys made a definite choice to sacrifice Carol Peeler's well-being for the possible good of the group.[9]

25. Third, and finally, as referenced above, the testimony of reporter Sally Giddens also makes it is clear that Carol Peeler was sacrificed. In the Spring of 1989 Ms. Giddens interviewed Jordan for an article which she was writing about Carol Peeler's guilty plea. Giddens had heard rumors about the immunity offer having been made and specifically questioned Jordan about it. In their first conversation Jordan made several admissions, including the fact that Alexander had offered to meet with him to discuss immunity for Carol Peeler, that Alexander told him that

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[9] Other members of the "group" do not share the view of their lawyers as to what was in their best interest. In fact, the President of the Hillcrest companies, John Jaeger, believes that the most likely result of the government having had early access to Carol Peeler is that it would have either abandoned prosecution altogether or focused its attentions on Ron Williams, the real culprit in the Hillcrest affair. Exhibit 23, pp. 1-4, 164-68. Mr. Jaeger's belief, in retrospect, is that the defense was orchestrated by the highly paid lawyers on the defense team in the way that best benefitted such lawyers. Id. at pp. 155-157.

"only one person would slide", that Jordan had decided not to meet with Bill Alexander to discuss immunity for Carol Peeler because he was working on a **global settlement offer via an approach by Ken Gideon in D.C.**, that it was **"presumable that we would have had the same deal"** as Buzz Tompkins "had we followed up on it", but that he chose not to follow up on the possibilities of immunity for Carol Peeler because **"we were remaining loyal to the other people"**. These matters are confirmed in Ms. Gidden's Oral Deposition, Exhibit 10; and in her contemporaneous handwritten notes of her conversation with Mr. Jordan. Exhibit 11.

26. Thus, the evidence strongly suggests that Darrell Jordan's failure to apprise Carol Peeler of her immunity offer was directly related to a conflict of interest. His judgment was clouded by conflicting loyalties to the "other people" in the joint defense group, and is, therefore,

presumptively prejudicial. Moreover, H&L's own internal memorandum also shows a conflict of another type, i.e. that H&L had apparently consulted with another client, the Hillcrest accounting firm of Alexander Grant, which might have been implicated in criminal wrongdoing had Peeler been permitted to talk to the Government. Exhibit 13, December 22, 1985, p.5[10]

27. Thus, to put it in terms of the **Strickland** case, Jordan's representation (a) was **deficient** because he

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[10] H&L attorney Askew explained her concern about this potential conflict of interest as follows:

> "Alexander [Grant] may raise another potential problem if Peeler enters into an agreement with the government. As you are aware, Alexander and/or George Banks initially interviewed this firm about representing them in this matter. Although I have no personal knowledge of what George Banks or other Alexander representatives revealed to lawyers at this firm, they may make some argument that this firm was privy to information that may be transferred to Peeler for the government's use."

breached his particular duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution," and (b) it is **presumptively prejudicial** to Peeler because he breached "the **duty of loyalty, perhaps the most basic** of counsel's duties." **Strickland v. Washington**, supra 104 S.Ct. at 2065, 2067.

28. PROVEN PREJUDICE: There is also proof of actual prejudice. As noted above, the litmus test of prejudice under the **Strickland** analysis is "that there is a reasonable probability that, but for counsel's unprofessional errors, **the result of the proceeding would have been different.**" 104 S.Ct. at 2068 (emphasis added). There would clearly have been a difference in Peeler's case if her lawyer told her that the Government was willing to give her immunity.

29. First, it is clear from the Government's perspective that there would have been a difference, because an AUSA with authority[11] to communicate the offer of immunity has specifically sworn that **"I am sure that, if Darrell Jordan had told me that Carol Peeler accepted my offer of immunity, she would have received immunity."** Exhibit 4, Alexander Affidavit.

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[11] There is ample proof of Mr. Alexander's authority to make the offer and bind the Government, including his own affidavit in which he states unequivocally that **"I had authority to communicate both offers."** Clearly he had or obtained the requisite authority to immunize Buzz Tompkins because he was able to deliver immunity for Tompkins in a letter signed by U.S. Attorney Marvin Collins and other appropriate officials. Exhibit 18. (Tompkins' immunity letter). Mr. Alexander also indicated that he had "previously cleared any offer of immunity with the Department of Justice (Tax Division)," and that, indeed, the form used for the Tompkins letter agreement conferring immunity was provided to him by that division. Exhibit 4, Alexander Affidavit.

Alexander's statements about his authority are corroborated by Ed Vellines, a man from DoJ (Tax Division) with extensive experience pertaining to immunity offers who testified that in his opinion, "an Assistant US Attorney conducting a criminal tax grand jury investigation had the authority to confer informal immunity in the course of conducting that investigation, and, if extended to Carol Peeler through her attorney, such conferral would be binding on the United States Government and preclude her prosecution for any and all matters related thereto". Exhibit 26, Vellines Depo. at pp. 10-11.

30. Second, Peeler would have accepted the immunity offer and cooperated with the Government. There are several sources of proof for this proposition. Darrell Jordan himself has testified that "I would have insisted as I'm sure her other attorneys would have, that she take that opportunity and run with it." Exhibit 9, Jordan Deposition at p. 30. Similarly, her other attorney Doug Mulder has testified that, when told by Alexander that immunity had been offered to Peeler he immediately responded "we'll take it", and further elaborated that "if the offer had been on the table **I would have grabbed it** while it was there." Exhibit 20, Excerpts from Oral Deposition of Doug Mulder, at pp. 44, 53. Mr. Alexander has corroborated this portion of Mulder's testimony. Exhibit 3, Alexander Deposition at pp. 25-26. Peeler has also confirmed this in her deposition testimony. Exhibit 17, Peeler Deposition at p. 120-121. Consequently, prejudice is apparent and proven.

31. Third, prejudice is proven because the uncontroverted evidence shows that **both risks** which Peeler's junior H&L lawyers had anticipated, in fact happened. Recall that Kim Askew and David O'Connor had recommended to Darrell Jordan that "we ought to **wait some reasonable additional** period to see whether the Gideon initiative will bear fruit, and **then pursue** the matter [of immunity] with Bill Alexander." They made this recommendation knowing that "[t]he **risks of doing so are** [i] that Bill will find another **crack in the dyke** [sic], or [ii] develop additional harmful information on Carol." These risks materialized.

32. As the Alexander Affidavit demonstrates, when Jordan failed to get back in touch with AUSA Alexander, the Government made the immunity offer to Buzz Tompkins, who accepted "quickly". Thus, "Bill" found another "crack in the dyke [sic]". See Exhibit 9,

Jordan Deposition p.78. This killed any chance for success that the Gideon Initiative might have had. It also developed "additional harmful information on Carol."

33. Prior to Tompkins, the Government was taking a broad-brush approach to the prosecution. But when the Government got access to Buzz Tompkins' story, the entire focus shifted. Tompkins did not believe that the information that he had would help the Government to prosecute any of the other Hillcrest principals. But it did. According to the testimony of Agent Hernandez, based on information furnished by Tompkins, the entire focus of the government's case shifted to the technical "backdating" offense to which Peeler and Jaeger ultimately pled, an offense which was much easier to prove. Exhibit 6, Hernandez Oral Deposition at pp. 75-77.

34. Not only was the "backdating" charge easier for the government to prove, it was also much harder to

defend against. The defense to this type of indictment was significantly more difficult because there was no question about the fact that Peeler had -- on two days in September 1982 **BEFORE** the "effective date" of one provision of a bill ultimately passed by Congress on January 12, 1983,[12] --

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[12] The statute in question was the Technical Corrections Act of 1982, Pub.L. 97-448, 96 Stat. 2365-2412. Exhibit 28 is a copy of the official version of this highly-technical, voluminous statute. The bill passed the House on September 14, 1982, the Senate on September 30, 1982, and ultimately became law on January 12, 1983. It has many, many different effective dates for various technical amendments.

But the part that ostensibly made the Hillcrest "Byrd" partnerships illegal had an effective date of September 22, 1982, although it also permitted some elections by taxpayers for retroactive application and further contained provisions for "options designated as held for investment." 96 Stat. 2385-87.

These facts arguably give rise to yet another, entirely different, species of ineffective assistance, i.e. defense counsel's failure to investigate, research, or seek to quash the indictment on the ground that it violated the ex post facto prohibitions of Article I, 9, clause 3 of the Constitution. A failure to investigate or pursue a crucial defensive issue can constitute ineffective assistance under the Strickland standards. Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990). Only this Court knows how it would have ruled on a Motion to Quash the indictment which laid out the ex post facto argument. But, again, it is clear that had such a Motion been filed, "there is a reasonable probability that . . . the result of the proceeding would have been different," within the meaning of Strickland, supra, 104 S.Ct. at 2068 (emphasis added).

consummated trades for bonds "as of" earlier in that week. The days in question were Thursday and Friday, September 23-24, 1982. On these days, Peeler learned that Congress was considering a statute which might alter the deductibility of the coupon payments and that it might be effective "as of" September 22, 1982. She discussed alternatives with their trading partners and it was suggested to her that, because she had already identified bonds that she intended to buy and that the traders had maintained them in inventory for her, that she could consummate the transactions "as of" Monday - Wednesday of that week, September 20-22, 1982. She consulted tax lawyer Ron Williams about the propriety/legality of doing "as of" trading, and was told (with legal citations) that it was legal and customary. So she made the trades. Exhibit 17, Carol Peeler Deposition Excerpts at pp. 123-124. Thus, Peeler was charged with a crime based on acts which she did in September 1982, even

though the bill that made those acts unlawful was not enacted until January 12, 1983.

35. Her principal defense to these charges was **reliance on professional advice**. Specifically, the defendant was relying on the fact that she had been told by Ron Williams, a tax lawyer that "as of" trading was legal. However, after her indictment, her counsel advised her to plead guilty, in part, because they feared that this Court might instruct the jury that she was not entitled to rely on professional advice, which would be tantamount to an

instructed verdict of guilty.[13] Exhibit 17, Deposition of Carol Peeler, at pp. 93-94.

36. And so, again, it is apparent from the facts that, if Jordan had communicated the immunity offer to Peeler "there is a reasonable probability that, . . . **the result of the proceeding would have been different,**" **Strickland**, supra, 104 S.Ct. at 2068 (emphasis added).

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[13] It appears that this advice was probably erroneous. Case law does support the reliance on professional advice defense. Indeed, only last year, the Supreme Court held that – even if the defendant's misunderstanding of the tax law was objectively unreasonable, if he had a good faith, subjective belief in his position he would still be entitled to have the jury instructed that such a belief was a valid defense. Cheek v. United States, _____U.S. _____, 111 S.Ct. 604 (1991). The Fifth Circuit was in the "subjective belief" school prior to this time (and prior to the time that Peeler was advised to plead guilty.) United States v. Whiteside, 810 F.2d 1306 (5th Cir. 1987). This is, of course, simply a way of negating mens rea. On that issue, it is significant that Peeler had passed a polygraph exam which indicated that she did not have any knowledge that Markowitz was not really doing the trades – if, in fact, he was not. Exhibit 25.

The advice to plead guilty was not based entirely on the expectation that this instruction might be given. As Peeler's deposition testimony illustrates, the most compelling consideration was that, if both of the Peelers were convicted and incarcerated, her six year old daughter and two year old son would be effectively orphaned. Exhibit 17, Peeler deposition excerpts at pp. 88-89.

Ineffective Assistance from Doug Mulder

37. After Jordan failed to communicate the offer of immunity or to respond to AUSA Alexander, a criminal defense specialist named Doug Mulder was hired by HUGHES & LUCE to assist in Peeler's defense. In early 1986 he told AUSA Bill Alexander that Peeler would like to cooperate with the Government and he asked for immunity to enable her to do that. Alexander told him about his conversation with Jordan, and that she had already had her chance. Exhibit 3, Alexander Deposition at p.26. According to Alexander's testimony, Mulder then advised him that Jordan had failed to communicate the immunity offer to Peeler. Mulder has testified that he chose not to believe Alexander. Therefore, he did not tell his client about the Government's claim that she had been offered immunity until three years later, on April 3, 1989, a few days **after she had pled guilty** on Mulder's advice. Exhibit

17, Deposition of Carol Peeler, at p. 152-153. Exhibit 20, Excerpts from Oral Deposition of Doug Mulder, at pp. 45-53. His reason for withholding this information from his client was, that he considered that "the deal was down the drain. The barn door was closed. It was no longer a viable option." His purpose was "not to create dissension." In other words, he was concerned that Peeler not be angry with his cocounsel, Darrell Jordan. Thus, he, too, breached his fundamental duty of loyalty to his client and was "deficient" within the meaning of **Strickland**. Id. p.51. As to the question of prejudice, if the Court accepts Mulder's interpretation, it would mean that Peeler had already been **irretrievably prejudiced** by Jordan prior to Mulder's entry into the case. However, that would still not excuse his unreasonable failure to advise his client of the Government's position.

38. But, on the other hand, it does seem that Mulder's ineffectiveness and inactivity could also be viewed as prejudicial because he could have done several things which would **probably** have altered the outcome of this case (within the meaning of **Strickland**). First, he could/should have told his client what the prosecutor told him. Second, when the indictments came down, he could have apprised this Court via Motion to Quash the Indictment that Peeler had missed a chance for immunity because her lawyer -- Mulder's cocounsel (who had paid him $50,000) -- failed to communicate the government's offer to her. Only this Court knows how it would have reacted to that information at that time. But it seems fair to say that, had Mr. Mulder acted in this reasonable fashion "there is a reasonable **probability** that . . . **the result of the proceeding would have been different.**" Strickland, supra, 104 S.Ct. at 2068 (emphasis

added). Consequently, Peeler was also prejudiced by Mulder's deficiencies.[14]

The Government Was Aware of the Ineffective Assistance

39. Although it is now clear in light of cases such as **Kimmelman v. Morrison**, 477 U.S. 365, 106 S.Ct. 2574, 2585, 91 L.Ed.2d 305 (1986), and **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed. 821 (1985), that an ineffective assistance claim which passes muster under the **Strickland** criteria is imputed to the government so as to invalidate the conviction, it is significant from the standpoint of fully understanding this case and attempting to reach a just result that the Government was **fully aware** of Mr. Jordan's failure to communicate its immunity offer to Ms. Peeler, and, moreover, had a **timely opportunity** to

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[14] It is also significant that Mulder did not disclose this information to Peeler for over three years, and then did so three days AFTER she had pled guilty. A lawyer who allows a client to plead guilty without disclosing all potentially relevant defenses has, ipso facto, prejudiced his client.

achieve the benefits for the Government which it would and should have received if Mr. Jordan had communicated the offer.

40. As noted above, former AUSA Alexander has testified that, in early 1986, Mulder (and Judge Zimmerman, a lawyer representing Charles Peeler) met with him to seek immunity for the Peelers. In that conversation, Mulder specifically told him that Jordan had failed to communicate the offer to Carol Peeler. Exhibit 3, Alexander Deposition at p.27. Indeed, Alexander has testified that, Mulder even said "I wouldn't want to be his malpractice carrier." Exhibit 3, at p. 26.

41. More importantly, the message that Mulder came to deliver was that Carol Peeler was willing to cooperate with the Government and would do so in exchange for immunity. Thus, had it chosen to do so, the Government could have had access to Carol Peeler's

testimony in early 1986. But one person[15] had already been allowed to "slide", so Peeler had to suffer the consequences of her **attorney's** failure to cooperate with the Government.

42. Bill Alexander left the United States Attorneys' office before the Hillcrest indictments were ever handed down. However, there is proof that the subsequent prosecutors were also aware of the fact that Mr. Jordan had failed to communicate the immunity offer. We do not have testimony from the Justice Department prosecutors who handled the case, but we do have the colorful testimony of IRS agent Ernesto Hernandez. Hernandez testified that he was present approximately four years after the prosecution began when, during the course of plea negotiations, Jordan

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[15] Ironically, Buzz Tompkins, the person that it chose to immunize when Jordan failed to communicate the offer to Carol Peeler, was not even a target of the criminal investigation. Exhibit 27 IRS Criminal Referral. So, it was not a question of the Government having already let one big fish out of its prosecutorial net, but rather, simply, application of the "only one will slide" philosophy.

and his cocounsel Doug Mulder were told by government attorneys that the **"train had pulled out of the station"**, that the immunity offer was not "on the table anymore," and that Jordan had simply "fucked up" Exhibit 6, Hernandez Deposition at pp. 72, 74.

If the Government Was Unhappy With Peeler's Testimony, Its Remedy Was to Prosecute for Perjury

43. Former AUSA Alexander believed in 1985 that Carol Peeler was involved in a big securities "scam". Therefore, he has sworn that the version of the "truth" which would have expected Carol Peeler to tell him was that all of the Hillcrest principals were knowingly involved in such activities. Exhibits 21-22 (Additional Affidavits obtained by H&L's state court attorneys from Bill Alexander).

44. This Court need not run down that rabbit trail.[16] But, for the sake of a full presentation, we will discuss the matter. The short answer to the argument is that, if Jordan had communicated the offer to his client and insisted that she take it (as he has testified), Peeler would have received the immunity grant first, and then been debriefed. Exhibit 4, Alexander Affidavit. This was, in fact, exactly what H&L attorney Kim Askew envisioned when she wrote: "get an agreement with the government **before Peeler talks.**" Exhibit 13, December 22, 1985, Memo at p. 4. Although the government might have been

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[16] We do not know whether the Government will seek to advance such an argument in this case, or, indeed, whether and to what extent Ms. Peeler's former counsel or their agents will now cooperate with the Government to oppose this Motion. However, we are concerned because of the great lengths to which the United States Attorney has gone in assisting H&L in the state court litigation, i.e. providing several affidavits to the defense indicating that no immunity was authorized or would have been authorized by the government for Peeler, without bothering to insist that the affidavits reflect that his signature appeared on Tompkins' immunity letter.

dissatisfied with the real truth, its remedy lay in a prosecution for perjury -- which would have been highly unlikely in view of the fact that Ms. Peeler has been cleared by polygraph as a sooth-sayer. See Exhibit 26, Vellines Deposition at pp. 285-90; Exhibit 25, Report of Polygraph Examination.

45. A careful examination of Exhibit 18, the Tompkins immunity letter (which Alexander has said would have been the same for Peeler) illustrates the point. Tompkins' side of the deal was simply that he agreed that he would "truthfully disclose all information" and otherwise cooperate.[17] Exhibit 18, Tompkins' Letter, at p. 2. The government's remedy if they thought that the immunity

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[17] Tompkins did not have to admit guilt. Indeed, his letter agreement with the government specifically provided that "[i]t is understood and agreed that by execution of this document, Mr. Tompkins does not admit criminal guilt or civil liability in connection with any transaction." Nor did Tompkins consider the information that he shared with the government to be incriminating of any other Hillcrest principal. Exhibit 29, Tompkins Deposition at p.103.

recipient was lying to them was to prosecute them for "any Federal criminal violation including, but not limited to, **perjury and obstruction of justice.**" To assist the government in proving that the recipient was lying, the letter further provides that "[i]t is understood and agreed that Mr. Tompkins will submit to polygraph examination for truth verification at the instance and request of the concerned investigating agencies." Id.

46. Alexander's Affidavit, Exhibit 4, explains that the procedure which was ultimately employed in the grant of immunity for Buzz Tompkins, and which would have been employed in the case of Carol Peeler if Darrell Jordan had communicated her acceptance was (1) a written grant of immunity would be finalized, and then (2) the government would have interviewed her.

47. Several things could have happened as a result of those interviews. First, the prosecutor could have learned

that the government had been fed bad information from its felon-turned-informant Ed Markowitz. Markowitz was a government securities dealer who allegedly engaged in some bogus trades.[18] As part of a plea bargain he implicated a number of other people, including Hillcrest's principals, in his own scheme. He was thought by the government to be an extremely valuable source of incriminating evidence -- or, as one agent put it, a "golden egg". Exhibit 6, Hernandez Oral Deposition at p. 22-23. But, if the Government had had access to Peeler's testimony, it would probably have realized that Markowitz was a liar -- at least, insofar as his attempts to implicate Hillcrest principals. If the government had had access to Carol Peeler's knowledge -- verifiable by

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[18] Revenue Agent Mike Smith claims to have found objective evidence in Markowitz' books and records that he had done some bogus business. However, the putative proof that any Hillcrest principal or employee had knowledge of Markowitz' delicts rested squarely on the shoulders of Markowitz himself.

polygraph -- it might have learned that it was focusing its prosecutorial energies on the wrong people.

48. Prosecutor Alexander, although still believing that Carol Peeler might have made his case, has acknowledged that possibility: As he notes, "if I had thought that she or the other Hillcrest principals were innocent, or **if I became persuaded of that fact,** I would not have recommended indictment and/or prosecution." Exhibit 4, Alexander Affidavit. Thus, it is entirely possible that, had the government had Peeler's early cooperation they would have been persuaded to either (a) drop the investigation entirely, or (b) focus the prosecution on Ron Williams.[19]

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[19] As noted above, this is exactly what Mr. Jaeger has testified that he thought would have happened if the Government had had early access to Peeler. Exhibit 23, Jaeger Deposition at pp. 165-166.

49. Or, it is possible that the Government might not have believed Ms. Peeler. Frankly, this seems to be highly unlikely in view of the fact that, when the Government finally debriefed Carol Peeler in 1989 pursuant to her plea agreement in this Court, Exhibit 19, it was apparently fully satisfied that she was being truthful, because it never sought to abrogate the plea.

50. However, just for the sake of argument, what if the prosecutor Alexander had not believed Peeler. What would have happened then? The procedure for verification spelled out in the Tompkins' immunity letter was via polygraph examination. What would the polygraph have disclosed? The Court need not speculate on that point. In the spring of 1986, Darrell Jordan arranged for Carol Peeler to be examined via polygraph so that he could share the results of that testing with the government. See discussion in Exhibit 9, Jordan Deposition at pp. 19-22. The polygraph

report, Exhibit 25, demonstrates that Peeler has been telling the truth. It is very unlikely, in the face of this report, that the United States Government would have sought to prosecute Carol Peeler for perjury or to have voided the immunity grant.

51. But, going one step further, even if the Government did elect to prosecute her for perjury[20], who would decide whether the prosecution could go forward, and who would bear the burden of proof? The law is that the Government would not be entitled to be the sole arbiter. The matter would create a justiciable controversy which would have been resolved by this Court. And the lead case

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[20] There is an argument to be made that the Government could attempt to void the entire immunity grant and prosecute for the underlying offenses. However, the former DoJ prosecutor most knowledgeable about such matters has opined that the prosecution for perjury would have been the chosen course of action if the Government believed that Peeler was lying. Exhibit 26, Vellines Deposition at pp. 285-86.

in this area points out that the burden of proof would have been on the Government:

> We believe that constitutional principles of fairness also require that once the government acknowledges the existence of an agreement, the **government has the burden** of establishing a breach by the defendant if the agreement is to be considered unenforceable.

United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1980), cert. denied, 101 S.Ct. 3008 (1981). See United States v. Pelletier, 898 F.2d 297 (2nd Cir. 1990). Again, only this Court would know how it might rule on such a matter when presented with a full record, including Peeler's polygraph results (Exhibit 25). What is clear, however, is that "the result of the proceeding would have been different," within the meaning of Strickland. 104 S.Ct. at 2068.

Appropriate Remedy

52. As noted at the inception of this prolix Motion, §2255 empowers the Court to grant whatever relief it deems **"appropriate"** specifically including the authority to **"vacate and set the judgment aside and . . . discharge the prisoner"**.

53. What relief is appropriate in this case? Obviously, justice requires that the Court strive to put Ms. Peeler in the position that she would and should have been in had her counsel rendered the constitutionally required effective assistance. There is no speculation about that. The prosecutor has sworn that "I am sure that, if Darrell Jordan had told me that Carol Peeler accepted my offer of immunity, **she would have received immunity.**"

54. The Court cannot take away the shame, humiliation, embarrassment and anguish of Ms. Peeler's indictment, plea, conviction and sentencing. The Court cannot restore to Ms. Peeler the hundreds of hours of

community service that she has already rendered -- in the trenches -- taking hotline calls from battered women. The Court cannot give Carol Peeler back the last six years of her life. This Court cannot require Ms. Peeler's lawyers to compensate her for the horrendous suffering that she has endured as a result of their shortcomings.[21]

55. BUT, the Court can -- and should -- "**vacate and set the judgment aside and . . . discharge the prisoner**". 28 U.S.C. §2255.

56. And how about the Government? The Government has already exacted more than a pound of flesh from Ms. Peeler and her family as a result of her lawyers'

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[21] This Court can, and probably should, impose sanctions against members of the bar whose misconduct has compromised the processes of the Court. See Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 837, 83 L.Ed. 821 (1985)(courts can police attorney misconduct by imposing "sanctions against the attorney rather than against the client."). An appropriate sanction in this case would undoubtedly include an Order requiring H&L to refund the hundreds of thousands of dollars that they received for Peeler's defense after December 1985.

failure to "play ball". And the Government has also had the benefit of Carol Peeler's full and truthful debriefing. As Alexander's testimony makes clear, they could have had it in 1986 when Mulder went to Alexander to seek immunity. Exhibit 3, at pp. 25-26 . But they chose to wait.

Conclusion

For the foregoing reasons, Movant Peeler urges the Court to vacate her judgment of conviction and discharge her from all charges.

Respectfully submitted,

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Certificate of Service

The undersigned counsel hereby certifies that he has caused a copy of the foregoing pleading to be served on all counsel of record via US Mails, this ____ day of _____, 1991.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 15 1992
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION -- HON. A. JOE FISH)

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

EXHIBITS TO DEFENDANT PEELER'S §2255 MOTION

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Peeler Exhibits to §2255 Motion

Exhibit 1 — Defendants Jordan and HUGHES & LUCE's Motion for Summary Judgment in the state court case, seeking summary judgment, inter alia because "D. PEELER DID NOT ATTEMPT TO WITHDRAW HER PLEA OR HAVE HER CONVICTION SET ASIDE."

Exhibit 2 — Amended Order Granting Summary Judgment in the state court suit on grounds IV(C) and IV(D).

Exhibit 3 — Entire Transcript of Oral Deposition of former Assistant United States Attorney William F. Alexander, attesting to immunity offer.

Exhibit 4 — October 24, 1991, Affidavit of former Assistant United States Attorney William F. Alexander, again verifying that he "made a **definite, unambiguous offer of transactional immunity . . . to Darrell Jordan, the attorney for Carol Peeler.** . . . [and, that] "I am sure that, if Darrell Jordan had told me that Carol Peeler accepted my offer of immunity, **she would have received immunity.**"

Exhibit 5 — Excerpts from the deposition on written questions of IRS criminal agent Ernesto

Hernandez, corroborating Alexander's testimony.

Exhibit 6 — Excerpts from the oral deposition of IRS criminal agent Ernesto Hernandez affirming his affidavit and providing other information.

Exhibit 7 — Affidavit dated 9/27/91 from IRS revenue agent Paul Michael Smith, explaining the reasons for his selection of Ms. Peeler as the first choice for governmental immunity and also corroborating Alexander's testimony about the immunity offer itself.

Exhibit 8 — Excerpts from the oral deposition of IRS revenue agent Paul Michael Smith.

Exhibit 9 — Excerpts from the oral deposition of Darrell Jordan, confirming that no offer of immunity from the government was ever communicated to Carol Peeler.

Exhibit 10 — Excerpts from the oral deposition testimony of D Magazine reporter Sally Giddens establishing that Darrell Jordan told her that immunity could have been obtained for Peeler but that Jordan did not pursue it because "he said, '**we were remaining loyal to the other people in the case**'".

Exhibit 11 — Sally Giddens' handwritten notes documenting her conversations with Darrell Jordan.

Exhibit 12 — Joint Defense Committee notes (produced by HUGHES & LUCE as part of discovery in state court litigation) documenting meeting with Ken Gideon to launch the "Gideon Initiative".

Exhibit 13 — H&L Memorandum dated 12/22/85 discussing implications to Joint Defense effort if "Peeler does enter into an agreement with the government", recommending that Jordan "get an agreement with the government before Peeler talks", and identifying a potential conflict of interest with another H&L client if Peeler took immunity.

Exhibit 14 — H&L Memorandum dated January 21, 1986, discussing three options for Carol Peeler's defense, and concluding that they should continue to "wait some reasonable additional period to see whether the Gideon initiative will bear fruit, and then pursue the matter [of immunity] with Bill Alexander" even though "[t]he risks of doing so are that Bill will find another **crack in the dyke** [sic] or develop additional harmful information on Carol." See discussion of this matter at Jordan Depo. at pp. 75, 77-79.

Exhibit 15 — Excerpts from deposition on written questions from Assistant Secretary of the Treasury (Tax Policy) Ken Gideon confirming his involvement and explaining his efforts.

Exhibit 16 — Excerpts from deposition testimony of attorney Paul Wright, verifying that on August 11, 1988, Darrell Jordan told him that the offer of immunity "had originally been offered to Ms. Peeler but that it had been **turned down.**" Page 28.

Exhibit 17 — Excerpts from oral deposition of Carol Peeler

Exhibit 18 — March 10, 1986, letter from government to attorneys for Buzz Tompkins, finalizing his immunity agreement with the Government.

Exhibit 19 — Carol Peeler's plea agreement in this case (Note: similarities in requirement for truthful disclosure of information to the government to language of the Tompkins' immunity letter).

Exhibit 20 — Excerpts from oral deposition testimony of Peeler's criminal defense attorney, Doug Mulder, attesting to the fact that he was aware in early 1986 that AUSA Alexander claimed to have offered immunity to Carol Peeler, via Darrell Jordan, but that Mulder **did not tell Ms. Peeler** about this conversation or about the government's offer until **after she had pled guilty**.

Exhibit 21 — October 7, 1991, Affidavit of former AUSA William Alexander

Exhibit 22 — November 5, 1991 Affidavit of former AUSA William Alexander

Exhibit 23	Excerpts from Oral Deposition of John Jaeger
Exhibit 24	Joint Defense Agreement.
Exhibit 25	Report of Polygraph Examination of Carol Peeler
Exhibit 26	Excerpts from the Oral Deposition of Ed Vellines
Exhibit 27	IRS Criminal Referral
Exhibit 28	Stats. at Large
Exhibit 29	Excerpts from Oral Deposition of David "Buzz" Tompkins.
Exhibit 30	Judgment and Sentence in a criminal case in United States vs Carol Peeler.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 17 1992
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION -- HON. A. JOE FISH)

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

DEFENDANT/MOVANT PEELER'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION FOR §2255 RELIEF

Now comes, Carol Peeler, by and through her undersigned counsel and files this her Response to the Government's Response to Peeler's Motion for §2255 Relief and would show the Court the following:

1. There are very few disputes concerning either the facts or the law.

a) Facts: Significantly, the United States Government has not denied that AUSA Alexander made the offer of immunity in issue, nor that he was authorized to do so. Nor do they dispute the fact that Jordan failed to communicate that offer of immunity to Carol Peeler.

b) Law: Nor does the Government dispute that the proper matrix for analysis of the claim of constitutional infringement is the two-prong test established by **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny. Nor, indeed, does the Government dispute that, under this line of cases, failure to communicate an offer of immunity constitutes ineffective assistance of counsel, as the Fifth

Circuit held in **United States v. Plewniak**, 947 F.2d 1284, 1289 (5th Cir. 1991).

2. The Government's admissions greatly simplify the Court's task.

3. The main thrust of the Government's argument, which they use in an attempt to defeat both prongs of the **Strickland** test is that Doug Mulder, rather than Darrell Jordan, was the lead lawyer for Ms. Peeler at the time of her plea and sentence. The following sworn deposition testimony of Doug Mulder is dispositive of these arguments:

> A. They had been -- Hughes & Luce had been retained. And as I understood it, Darrell and Kim Askew and -- I don't remember whether -- I think David O'Connor. And I don't remember whether Tim Duffy was in it at that time or not. But they were going to do the vast majority of the research and preparation and that sort of thing. And my primary responsibility in it, if there was to be a trial, would have been to assist in the jury selection and to cross-examine Markowitz and just help

any way I could. **I didn't consider myself lead attorney in the case**.

Q. Who was the lead attorney in the case?

A. **Darrell was.**

Exhibit 31, Excerpts from Oral Deposition of Doug Mulder (pages 18-20) at p.19,l.17 - p.20,l.4.

4. The Government also argues that immunity was not available at the time of Ms. Peeler's plea. This is, of course, true. It had been given to Buzz Tompkins, the Government's second choice, when Darrell Jordan failed to communicate the offer to his client or to respond to AUSA Alexander. But this is the very gist of Peeler's complaint. Jordan blew her chance for immunity. After that, it is doubtful whether any advocate, including Daniel Webster who is said to have argued with the Devil himself, could have resurrected the offer. That was the

prejudice. After that Peeler was doomed to the criminal process.

5. The Government also argues that Carol Peeler would not have accepted immunity, or that the prosecutor might not have conferred immunity unless she told him what the prosecutor believed at that time to be true, rather than the real truth. The short answers to these questions are that Peeler has indicated in her Motion, and hereby reaffirms, that she would have accepted immunity and told the truth. Whether the truth would have been useful to the United States Government or whether it might have been incriminating would have been a judgment for a seasoned prosecutor to make.

6. Finally, the Government challenges the remedy sought, i.e. discharge of the defendant, branding it as "extravagant" and "entirely unreasonable", castigating Peeler because she "cites no authority that discharge from

all charges is the appropriate remedy", and representing to this Court that "we are not aware of any holdings to that effect".

The authority for this relief cited in Peeler's Motion is §2255 itself, which clearly states that "[i]f the court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall **vacate and set the judgment aside and shall discharge the prisoner** or resentence him or grant a new trial or correct the sentence **as may appear appropriate."** 28 U.S.C. §2255. Peeler did not cite any cases construing this phrase because it is so blatantly clear. However, she is surprised to learn that the United States Government's counsel are not aware of the United States Supreme Court's opinion in **Andrews v. United States**, 373 U.S. 334, 83

S.Ct. 1236, 10 L.Ed.2d 383 (1963), in which the High Court stated it unambiguously as follows:

> For a federal prisoner §2255 can perform the full service of habeas corpus, **by effecting the immediate and unconditional discharge of the prisoner.**

Id. at 339, 83 S.Ct. at 1239, citing Sanders v. United States, 372 U.S. 1 (1963).[1] The most recent case discussing the breadth of this Court's authority to fashion an appropriate remedy under §2255 is United States v. Garcia, 956 F.2d 41 (4th Cir. 1992), in which the Fourth Circuit explained the rationale for investing the trial court with such broad authority and discretion with respect to the appropriate remedy as follows:

> The §2255 remedy is broad and flexible, and entrusts to the courts the power to fashion an

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[1] The Sanders case discusses at some length the constitutional implications if §2255 were construed as conferring more limited authority than habeas corpus.

> appropriate remedy. . . . In this respect, §2255 is congruent with the common-law relief available on direct appeals involving breached plea agreements. . . . Indeed, this flexibility serves the interests of many **defendants, who may prefer specific performance** to withdrawal. A new opportunity to plead may be a **pyrrhic victory** for a defendant who faces the same (or greater) volume of evidence of guilt that persuaded him to plead guilty in the first place.

Id. at 45-46 (emphasis added, citations omitted). This case is particularly instructive on a number of points, including the Government's contention that it should not be responsible for defense counsel's shortcomings and that a defendant who had been deprived of constitutional rights with respect to a bargain with the Government is entitled to §2255 relief which gives her the **benefit of that bargain**. As noted in our Motion, the United States Government has already achieved the benefit of the immunity bargain, albeit later than it had hoped, because it received Carol Peeler's full and truthful cooperation via the Plea Agreement. The only

remedy that this Court could impose which will give Carol Peeler the benefit of that bargain is to fully discharge her from all charges. Anything less would, indeed, be a "pyrrhic victory".

7. Further proceedings. Rules 7 and 8 of the Rules Governing Section 2255 Proceedings give this Court broad latitude regarding what procedures it employs to adjudicate this Motion. The Court may consider the sworn testimony already before it without the necessity of a formal evidentiary hearing. Counsel for both parties have discussed the matter at some length. In light of the Government's response, admissions, and concessions, Peeler believes that the Court could grant the relief which she has requested on the basis of the record before it. However, if the Court has any lingering concerns, or believes that further evidence or legal arguments would be helpful, Peeler would urge the

Court to conduct such a hearing at the earliest possible juncture.

Conclusion

For these reasons, Peeler urges the Court to hold whatever proceedings or hearing the Court deems necessary and appropriate, and then to vacate her conviction and plea, discharge her, and/or grant such other relief as the Court deems proper and just under the circumstances.

Respectfully submitted,

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Certificate of Service

The undersigned counsel hereby certifies that he has caused a copy of the foregoing pleading to be served on all counsel of record via US Mails, this ____ day of _____, 1992.

_____

Filed 31 day of March
1989 at 10:30 o'clock am
NANCY HALL DOHERTY, CLERK
BY: /s/ G. HILLER, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA,
Plaintiff

V. CRIMINAL NO. 3-89-018-G

CAROL C. PEELER,
Defendant

PLEA AGREEMENT

COMES NOW the United States of America and defendant, CAROL C. PEELER, and hereby file this Factual Resume and attached Plea Agreement dated March 20, 1989. This constitutes the entire agreement between the United States and defendant.

FACTUAL RESUME

INDICTMENT:	CAROL C. PEELER has agreed to plead guilty to Count XVIII (18) of the 21 count indictment; aiding and assisting the filing of a false and fraudulent U.S. Partnership Return of Income (Form 1065) for Byrd Investments in violation of Title 26, United States Code, Section 7206(2).
PENALTY:	$100,000 fine or three years" imprisonment or both such fine and imprisonment. Maximum penalty: $100,000 fine and three years' imprisonment.
ELEMENTS OF THE OFFENSE:	The Government must prove beyond a reasonable doubt the following

elements of the offense as charged in Count XVIII (18) of the indictment.

1. The defendant, CAROL C. PEELER, aided, procured, counseled, or advised the preparation and presentation of a document in connection with a matter arising under the Internal Revenue Service Code;

2. The document was false as to a material matter;

3. The defendant acted willfully, that is to say, in violation of a known legal duty.

FACTS:

1. Defendant CAROL C. PEELER was a resident of the Northern District of Texas and resided at Dallas, Texas. She was the

vice-president of Hillcrest Equities, Inc., and president of Hillcrest Securities, Corporation, Inc. Prior to and subsequent to November 1, 1982, she owned 15 percent and 19 percent, respectively, of Hillcrest Equities, Inc., and was in charge of government securities trading at Hillcrest Securities Corporation, Inc.

2. Hillcrest Equities, Inc. (hereinafter Hillcrest Equities) was formed on August 11, 1980, and was incorporated in the state of Texas. On June 5, 1981, Hillcrest Equities formed a wholly-owned subsidiary, Hillcrest Securities Corporation, Inc. (hereinafter Hillcrest Securities) to

trade government securities and promote a tax shelter program.

3. Hillcrest Securities was a secondary government securities dealer which allegedly traded government securities with The Monetary Group II, The Monetary Group, N.V., and The Monetary Group G.S.I., which were secondary government securities companies owned and operated by Edward Markowitz (hereinafter Markowitz). These alleged government securities trades, commonly known as securities straddles, were made by Hillcrest Securities on behalf of investors - partnerships, individuals, and

corporations - who desired to, among other investment goals, take advantage of the tax benefits offered by the tax shelter program marketed and promoted by Hillcrest Equities, Hillcrest Securities, and various affiliated promoters and investment advisors in the United States.

4. An amendment to the Internal Revenue laws became effective September 22, 1982, which disallowed the substantial tax benefits generated by the Hillcrest tax shelter trading program.

5. CAROL C. PEELER aided and assisted in the backdating of documents for government securities

trades and for partnerships (known as the bird partnerships) formed after September 22, 1982, (the date of the aforementioned law change). No trades were made by CAROL C. PEELER or Hillcrest Equities or Hillcrest Securities and to CAROL C. PEELER's knowledge no bird partnerships were formed prior to September 22, 1982 (the date of the aforementioned law change). Specifically, after September 22, 1982, (the date of the aforementioned law change), CAROL C. PEELER on behalf of Hillcrest Securities arranged with Markowitz and The Monetary Group, N.V., to backdate the

government securities trades which were subsequently distributed to the bird partnerships.

6. Specifically, in Count XVIII (18) of the indictment, CAROL C. PEELER, aided and assisted in the preparation and presentation of a 1982 U.S. Partnership Return of Income for Byrd Investments to be filed with the Internal Revenue Service the backdated government securities transactions, which were distributed to the backdated bird partnerships, including Byrd Investments. The nature and date of the transactions which were related to the Byrd Investments' return were concealed in

order that the losses of $1,198,547.23 could be claimed, which losses CAROL C. PEELER then and there well knew and believed were not entitled to be claimed.

Respectfully submitted,

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Ben Franklin Station
Washington, D.C. 20044

/s/ CAROL C. PEELER
Defendant

/s/ DOUG MULDER
Attorney for Defendant

U.S. DEPARTMENT OF JUSTICE
TAX DIVISION
Washington, D.C. 20530

March 20, 1989

Filed 31 day of March
1989 at 10:25 o'clock a.m.
NANCY HALL DOHERTY, CLERK

Doug Mulder, Esquire
2370 Diamond Shamrock Tower
Dallas, Texas 75201

Robert R. Smith, Esquire
3601 NCNB Plaza
901 Main Street
Dallas, Texas 75201

Re: Carol C. Peeler and Charles Peeler

Dear Mr. Mulder & Mr. Smith:

1. On the understandings specified below, the United States will accept a guilty plea from Carol C. Peeler to Count XVIII (18) of Indictment CR 3-89-028-G charging her with aiding and assisting in the preparation and presentation of a false and fraudulent 1982 U.S. Partnership Return of Income, Form 1065, for Byrd Investments, in violation of 26 U.S.C. Section 7206(2), carrying a maximum sentence of three years' imprisonment and a $100,000 fine. If Carol C. Peeler and Charles Peeler fully comply with these understandings, the United States agrees to dismiss at sentencing the remainder of the charges contained in the aforementioned Indictment against Carol C. Peeler and Charles Peeler.

2. The understandings are that Carol C. Peeler and Charles Peeler shall truthfully disclose all information with respect to the activities of themselves and others concerning all matters about which this office --as well as the office of the United States Attorney for the Northern District of Texas -- inquire of them, shall cooperate fully with this office, as well as with the office of the United States Attorney for the Northern District of Texas and with agents of the Internal Revenue Service, and further, shall truthfully testify before the grand jury in the Northern District of Texas and/or at any trial or other court proceedings with respect to any matter about which this office, and the office of the United States Attorney for the Northern District of Texas, may request their testimony. This obligation of truthful disclosure includes an obligation to provide this office, as well as the office of the United States Attorney for the Northern District of Texas, upon request, with any documents, records, or other tangible evidence relating to the involvement of Carol C. Peeler and Charles Peeler in the activities relating to their involvement in the activities referred to in the first paragraph of this Agreement, and relating to the operation of Hillcrest Equities, Inc., Hillcrest Securities Corporation, Inc., its officers, employees, promoters, and other representatives.

3. In addition, Carol C. Peeler and Charles Peeler shall make themselves available at this office, as well as the office of the United States Attorney for the Northern District of Texas, whenever requested, for the purpose of preparation and providing further details pertaining to the activities referred to in the first paragraph of this Agreement, and relating to the operation of Hillcrest Equities, Inc., Hillcrest Securities Corporation,

Inc., its officers, employees, promoters, and other representatives.

4. It is further understood that Carol C. Peeler and Charles Peeler will file accurate amended personal federal income tax returns for the calendar years 1982, 1983, 1984, 1985, and 1986, and will pay all taxes, interest, and civil penalties due and owing to the United States or enter into an agreement with the Internal Revenue Service setting forth a schedule for the repayment of such taxes, interest, and civil penalties.

5. It is further understood that this Agreement in no way binds or restricts the Internal Revenue Service, which is not a party to this Agreement and remains free to pursue separately against Carol C. Peeler and Charles Peeler any lawful civil remedies it deems appropriate, including any assessments against Carol C. Peeler and Charles Peeler for additional taxes, interest, or civil fraud penalties which in the judgment of the Internal Revenue Service remain due and owing.

6. It is further understood that in exchange for Carol C. Peeler's plea of guilty to Count XVIII (18) of the aforementioned Indictment, the Government agrees, upon sentencing, to recommend that Carol C. Peeler be incarcerated for a period of 18 months. The Government, at its discretion, is free at sentencing to recommend a fine of up to $100,000. Otherwise, both parties are free to allocate at sentencing. At the conclusion of sentencing, the Government will dismiss all remaining counts of the Indictment as they relate to Carol C. Peeler and Charles Peeler. It is further understood that the sentence to be imposed upon Carol C. Peeler is within the sole discretion

of the sentencing judge. This office cannot and does not make any promise or representation as to what sentence Carol C. Peeler will receive. This office will inform the sentencing judge and the probation department of (1) this Agreement; (2) the nature and extent of Carol C. Peeler's activities with respect to this case; and (3) the full nature and extent of Carol C. Peeler's cooperation with this office and with the other offices referred to in this Agreement and the dates when such cooperation commenced. In addition, this office retains the right to present to the sentencing judge and probation department, either orally or in writing, any and all facts and arguments relevant to sentencing. It is further understood that this Agreement in no way effects or limits this office's right to respond to and take positions on post-sentencing motions or requests for information which relate to parole or reduction or modification of sentence.

7. It is further understood that Carol C. Peeler and Charles Peeler must at all times give complete, truthful and accurate information and testimony and must not commit any crimes whatsoever. Should Carol C. Peeler or Charles .Peeler commit any crimes or should it be determined that Carol C. Peeler or Charles Peeler has at any time given false, incomplete or misleading testimony or information to this office, or to any law enforcement official, judge, court, hearing officer, grand jury or other tribunal, or has otherwise violated any provision of this Agreement, Carol C. Peeler and/or Charles Peeler shall thereafter be subject to prosecution for any federal criminal violation of which this office, or the office of the United States Attorney for the Northern District of Texas, has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information

provided by Carol C. Peeler and Charles Peeler, and such information, and leads derived therefrom, may be used against Carol C. Peeler and/or Charles Peeler.

8. Furthermore, it is agreed that in the event it is determined that Carol C. Peeler and/or Charles Peeler has violated any provision of this Agreement, (i) all statements made by Carol C. Peeler and/or Charles Peeler to this office, or the office of the United States Attorney for the Northern District of Texas, or other law enforcement agents, or any testimony given by her or him before a grand jury or other tribunal, whether prior to or subsequent to this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereafter brought against her or him, and (ii) Carol C. Peeler and/or Charles Peeler shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence or any other federal rule, that statements made by her or him prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. It is the intent of this Agreement to waive any and all rights in the foregoing respects.

9. It is further understood that Carol C. Peeler has the right to plead not guilty and that she has a right to be tried by a jury, and that by pleading guilty, she has waived that right.

10. No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Sincerely,

/s/ JOHN P. FITZGERALD
Special Attorney

/S/ MICHAEL D. SHEPARD
Special Attorney
U.S. Department of Justice
Tax Division, Western Criminal
Enforcement Section
P.O. Box 972
Ben Franklin Station
Washington, D.C. 20044

We have discussed the proposed Plea Agreement, and knowingly and voluntarily accept the proposals contained therein.

/s/ CAROL C. PEELER
Defendant
Dated: March 20, 1989

/s/ DOUG MULDER
Attorney for Defendant Carol Peeler
Dated: March 20, 1989

/s/ CHARLES PEELER
Defendant
Dated 3/22/89

/s/ ROBERT R. SMITH
Attorney for Defendant Charles Peeler
Dated: 22 March 1989

ADDENDUM

The United States Agrees that it will move the court to dismiss the indictment against the defendant Charles Peeler at the time the Court accepts the defendant Carol Peeler's plea of guilty.

The defendant Charles Peeler understands and agrees that should he violate his portion of this agreement to cooperate with the United States, that the United States may reinstitute these criminal charges against the defendant Charles Peeler and as part of this agreement Charles Peeler waives any right he might have now or in the future to plead a bar to prosecution by reason of Title 18, United States Code, Section 3282 or 26, United States Code, Section 6531, the applicable statutes of limitations.

/s/ CHARLES PEELER
Defendant
Dated: 3/22/89

/s/ ROBERT R. SMITH
Attorney for Defendant

CHARLES PEELER
Dated: 22 March 1989

/s/ JOHN P. FITZGERALD
/s/ MICHAEL P. FITZGERALD
Special Attorneys
U.S. Department of Justice
Tax Division, Western Criminal
Enforcement Section
P.O. Box 972
Ben Franklin Station
Washington, D.C. 20044

U.S. DISTRICT COURT
NORTHER DISTRICT OF TEXAS
FILED
SEP 6 1989
NANCY DOHERTY, CLERK

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

V. **JUDGMENT IN A CRIMINAL CASE**

CAROL C. PEELER

CASE NUMBER:
CR3-89-028-(02)-G

3215 St. Johns Drive
Dallas, Texas 75205
SS# 457-88-2404

Douglas D. Mulder (retained)
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

(X) guilty as to count 18 on March 31, 1989.

THERE WAS A:

(X) finding of guilty as to county 18 on March 31, 1989

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF: aiding and assisting in the preparation of false income tax return to the Internal Revenue Service, in violation of

Section 7206(2) of the Internal Revenue Code and Title 26, United States Code, Section 7206(2), as charged in Count 18 of the 21-Count Indictment filed January 31, 1989.

Date of offense: 3/24/83

IT IS THE JUDGMENT OF THIS COURT THAT:

See Attachment "A"

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that defendant shall pay a total special assessment of $_____ pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED that all remaining counts of 21-count Indictment are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshall of this district.

( ) The Court orders commitment to the custody of the Attorney General and recommends:

Date of Imposition of Sentence: September 9, 1989

Signature of Judicial Officer:
A. JOE FISH, United States District Judge
Date: September 9, 1989

Attachment "A" to
JUDGMENT IN A CRIMINAL CASE
CR3-89-028-(02)-G
UNITED STATES OF AMERICA
V.
CAROL C. PEELER

IT IS THE JUDGMENT OF THIS COURT THAT: the imposition of sentence as to incarceration only is SUSPENDED and defendant is placed on probation for a period of FIVE (5) YEARS, upon the following special conditions:
that defendant: (1) observe and obey all laws--federal, state and local; (2) provide to the probation officer any requested financial information, including income tax returns and at least an annual financial statement; (3) file all delinquent tax returns and all tax returns that become due during the term of probation; (4) pay all delinquent taxes and any tax which becomes due during the period of probation; (5) provide at lease 1,000 hours of community service at the direction of the probation officer, such service to be completed within the first 48 months of supervision--this community service, to be of a non-managerial type position, shall be performed at one of the following facilities: (a) Bryan's House (hospice and day care center for children with AIDS); (b) Nexus (residential facility for women with substance abuse problems); (c) The Family Place (an emergency shelter for abused women and their children); additionally, up to twenty-five percent (25%) of this community service shall be directed at working with the Volunteer Center of Dallas, in developing a program to address the needs of children whose mothers are incarcerated; (6) not be employed in any financial, securities, or other business involving management of other people's money without the consent of the probation

officer; and (7) make restitution to the United States Government through the office of the Clerk of the United States District Court, Dallas, Texas in the amount of $150,000.00, such restitution to be totally paid by the end of the probationary period. Defendant may elect to pay this amount in installments of at least $2,500.00 monthly, the first payment to be due October 1, 1989, and a like amount to be due on the first day of each succeeding month until fully paid.

Defendant is FURTHER ORDERED to pay a fine of $100,000.00 plus the costs of prosecution of this case, such fine to be paid to the Office of the Clerk of the United States District Court, Dallas, Texas.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 2 1991
NANCY DOHERTY, CLERK

Carol C. Peeler

Dear Judge Fish:

I have been invited and encouraged to prepare a "submission" to set down for you my statement of the circumstances surrounding my crime, its effect on those around me and close to me, and my hopes for the future. I have agonized over this task for I feel that the weight of the world is on my shoulders and my future freedom is held in the balance. I feel like what I say or don't say will determine my fate and for that reason I just shudder as I weigh in my mind what words could I possibly say to express all that is in my heart.

I don't know you but I must trust you. You don't know me, and I pray that this letter will help you with your job which I know is difficult. I will be honest and I will try to be objective.

I take responsibility for my crime. In September of 1982, I participated in a transaction where my company made representations that purchases of government securities occurred on a given date when in fact they did not. I was told and believed these were "as of trades." I desperately wanted to believe that what I did was not wrong and that I acted reasonably.

I want to tell you that I acted reasonably. I desperately want to tell you that and believe it; but I must admit to you and to myself that what I did was wrong. This hurts. How did this happen to me? Why am I contemplating standing before a federal judge to receive my punishment? I am terrified. As I have relived these events over and over and over and their ugly consequences on my life I see where I was weak, where I was naive and where I failed myself.

As I have thought about this, I see crime as a decision of choice. Everyone must determine right from wrong, weigh the risks and take the consequences. My involvement with Hillcrest was not this kind of decision for me. I can recall no instance where I thought for a moment that what I was about to embark on would lead to my indictment. At the time, I never thought for a moment that I was making a choice that would lead to my sentencing on September 6, 1989. I can tell you from my heart and with all of my strength and conviction that I would not have made those choices had I known even remotely what the consequences of those choices could have been. What I did I did knowingly, and what I did was wrong. I hope I can open my heart to you and show you how this happened and try to show you that Carol Peeler, a person, is worthy of an opportunity to receive probation.

I am thirty-four years old and I have lived in this nightmare for years. It seems like I have been "under investigation" for almost all of my mature adult life. I have lived under the threat of criminal indictment. I have been indicted and I have pied guilty. I have been sued and deposed for days on end. All that represented security to me, respect to me, have been lost. The paranoia of stares

from people I know and don't know, the rumors and the whispers and the visions in my mind of people and their children turning away from my family persist. I have seen myself in a local magazine sitting behind bars, and the same magazine used my daughter's picture to sensationalize my plight. I told my daughter it was a pretty picture of her. I couldn't tell her of the shame that I felt, or the remorse or what this story may really mean to her life. There are days when I feel that all has been lost. This case has consumed me. It has become me and it rules my life and my relationships, even with my husband and my children. For over five years I have died a little bit everyday, living in fear and terror of the unknown. When this all began in 1981, had I been able to experience even one minute of the pain and fear that I now live with, I would have walked away. In 1981 I did not need Hillcrest. I was young, and through the efforts of my mother and dad, I had received the benefits of a college education and had started my life as an adult, looking forward to all of the wonders that the future held for me; husband, children, career and happiness. What I have let happen to myself is another crime. I have no career, there is little happiness in my life, but there is hope.

I did not seek Hillcrest out. Hillcrest sought me. A headhunter called asking if I would be interested in this new venture. I interviewed with the principles, Corky Jaeger, Bert Johansen, Ron Williams, and Buzz Tompkins, and told them that I was not interested. I was content. I had a job, a responsible job with a bank, and was being paid $22,000 or $23,000 a year. I was on my own and did not want the uncertainty of a start-up company. I am conservative by nature. I wanted consistency in my life. I did not want turmoil in my life. I said no to Hillcrest and my life went on.

I fell in love with Charles Peeler and we married. I was happy and very fulfilled. At twenty-five I became an instant mom with children fourteen and eleven. Charlie and I planned that our family would grow and that we would share with each other all of the excitement and adventure that our new lives together would hold. A career in business was not a driving force in my life at that time.

Shortly after my marriage the Hillcrest principles contacted me directly, again in an effort to encourage me to leave Preston State Bank and join the Hillcrest Equities firm. I entertained their offer at this time. I was more willing to accept the risks associated with a new company because I was more settled in my own life and they were so enthusiastic about what they were doing and the success they had experienced in only a few months of doing business.

I saw adventure, independence, and excitement. I was naive. I was unsophisticated. Through that point in my life I had always filled out a short form 1040S, never even having the need to itemize deductions. I did not have any experience or even knowledge of tax straddles, let alone the complicated legal concepts governing them. I saw a group of men who were successful, energetic, and excited about what they were doing. I was courted. They impressed me and flattered me at a time when I was bored with my responsibilities at the bank. They offered more money, a raise from $27,000 to about $34,000 a year. I would have more flexibility, independence, and an opportunity to own part of the company. I was truly impressed by what I saw. I did ask friends and acquaintances about these individuals and was told they were responsible and could be trusted. There was never any hint of danger or that the business Hillcrest was in was dangerous, questionable or suspect.

Not one person ever told me that this was a risky business. All that was done was, to my view, done openly and carefully. The people that I dealt with were professional. Ron Williams himself was a lawyer with an established Dallas firm and was looked to by many people, both within and without Hillcrest, for legal advice. He spoke at seminars attended by many other professionals and I know wrote legal articles in his area of tax expertise. I saw that Hillcrest retained huge accounting firms and sought the expertise of experts. As far as the Hillcrest program was concerned and all of the people that I would work for, I felt safe and I felt secure. I didn't feel a need to be protected.

Only since my indictment have I learned that those with whom I associated had, apparently from the inception, fears and knowledge of the dangers involved in their business. I recently saw a memo where outside of my presence and without my knowledge, my partners openly discussed the potential for loss of reputation, the risks of litigation and even criminal prosecution associated with their activities. This memo even acknowledged that this was kept from me. When I read this I felt betrayed and used. I did not need Hillcrest in my life. Had these men who I trusted been honest with me about their own deep fears, I would not be writing this letter to you today. I was twenty-five years old, I had my whole life in front of me. How could they hide from me the dangers that they apparently fully understood. Judge Fish, I would not have let this happen. I would have walked away.

My job at Hillcrest would be to decide what government securities at what interest rate would be purchased and sold, short or long, in order to achieve the desire investment results, ordinary losses in the year of

purchase and capital gains in the following year of sale. Hillcrest sent me to California to meet with Joe Karroll, who taught me the principles of the straddles and the mathematical calculations necessary to devise an investment program. The work was tedious. It was also my responsibility to order the purchase and sale of the actual securities. To effect the sales, I first worked with Mr. Karroll. I also, during my first year, attempted to develop relationships with major brokerage firms. I met with representatives of Bear Stearns, A.G. Becker and other nationally known brokerage firms. As I would meet with these brokers, they were all very familiar with the straddle investment opportunity and in fact conceded that many of their own executives used these straddles which were traded in-house for their own investment and tax planning. Several companies were interested in establishing a relationship with Hillcrest to assist us in facilitating the purchases and sales. These were all people with responsible positions and none of them cowered at the prospect of a relationship with Hillcrest. They seemed genuinely interested in Hillcrest. Straddles were viewed as aggressive tax planning but were not presented to me to be a violation of the law or even an investment that could lead to criminal investigations. The brokers could not eventually establish a relationship with Hillcrest because they said the capital requirements of the New York Stock Exchange would make their participation from a capital standpoint, exceedingly difficult. As I interviewed the brokers, our accountants, Alexander Grant, introduced Hillcrest to Ed Markowitz in early 1982.

During a trip to Washington, I dropped by Mr. Markowitz' office to introduce myself. This first visit was simply an introduction. I saw a well appointed office that was busy. It looked like what I would expect an office of

a successful small broker to look like. There were offices, equipment, a trading room, people moving about quickly, and a lot of paper. It was not a "back room." There was nothing sinister, evil or even alarming about it. Mr. Markowitz knew our business, was impressed that Alexander Grant had introduced us to him and was interested in forming a relationship.

I believed that the trades we would make with Mr. Markowitz and Mr. Karroll were bona fide, real and had economic substance to them. I did not believe that these were in any way sham transactions. I took comfort in the fact that our accountants, Alexander Grant, were going to audit our dealers, including Mr. Markowitz, and verify that our trades were in fact "real." I was not generally involved in the marketing of the Hillcrest programs, but I did attend seminars from time to time. They were attended by not only prospective investors but by the attorneys and tax advisers of those investors. Our own professionals attended the seminars including our lawyers and accountants. I saw that all that we did was in the open. The program was described in our brochures just as it had been described to me. We told the investors that our accountants would verify the trades and our accountants were present when these statements were made. I did not believe, and do not believe today, that the Hillcrest program was in any way illegal. I came to understand that it was in fact aggressive and that there was a risk of audit associated with the investment. Our investors were warned of these risks, but again the program and the risks were openly discussed and written about. Again, we had several lawyers and accountants who gave opinions on exactly what it was that we were doing. Close friends, people I respected and loved, even my parents invested in one or more Hillcrest programs. I mention in

detail this environment because it did affect, I believe, decisions that I would make later on that led me to where I am today.

There was always talk or reports that Congress would move to close the loophole, if you will, on the tax advantages available to straddle investments. This was openly discussed and we hired a specialist, an attorney and lobbyist in Washington, D.C., to keep the finger on what was going on in Congress as it might affect our program. Again, this was done in the open with professionals who, I believed, held themselves out as providing the types of services for businesses like Hillcrest. No one sneaked around in the dark or in alleys to sell Hillcrest programs. Although it was aggressive, it had every indication, to me, of an honest and legitimate business.

The business grew beyond our expectations. Knowledgeable and sophisticated people with their own accountants and lawyers purchased Hillcrest programs. As our 1982 program neared its height, we were informed through our lobbyist in Washington that Congress might drastically curtail or eliminate straddles. This was nothing new or even alarming. It was the belief that Congress would eventually eliminate the tax benefits of straddles and it would be just a matter of when and to what extent.

I was paid a lot of money. I knew where the money was coming from. I knew the number of trades. It was not alarming or scary. I felt we were successful. All those outsiders who looked over our shoulder thought we were successful. The professionals, who Hillcrest paid hundreds of thousands of dollars in those early years, also thought we

were successful. Not illegal. Not borderline illegal. Just successful.

The job's demands on my time were great. It took long hours to do the mathematical calculations necessary for each investment. Even with the help of computers and work sheets, this was a time-consuming task. I was still responsible for those mathematical calculations. It took a lot of time to effect the trades with the brokers. The paperwork associated with the trades was also voluminous, time consuming and took a lot of effort to insure it was accurate. Nothing that I did at this juncture led me to believe that I was not actually buying and selling the government obligations.

I had a life outside of Hillcrest. My husband and my marriage were important to me. I was pregnant with my first child during 1982 including the September time frame. I found I preferred the time with my husband, my teenage stepchildren and thoughts of my own baby were the most rewarding. I felt complete, alive, comfortable. I found more and more of my time giving to these people who I loved. I became immersed in civic activities. Hillcrest was a job, financially an important job but nonetheless a job. I knew I would not be at Hillcrest indefinitely and I certainly knew I did not want to spend the rest of my life performing tasks -- technical or otherwise, associated with my position.

At age twenty-six I thought I was a success. I looked in the mirror and I liked what I saw. I look in the mirror today and sometimes I want to cry. I have aged not just physically. Emotionally I have aged beyond my years. The lines are deeper. The happy trusting person is not there. At twenty-six I had no real fears other than for the health of my

children. At thirty-four I am full of fear. At twenty-six I trusted everyone. At thirty-four I don't know if I can trust at all.

In September of 1982 we were informed by our Washington lobbyist that Congress would soon pass a bill that would eliminate many of the tax benefits of the Hillcrest program. No one knew when this legislation would finally pass or when it would be effective or even if it would be retroactive. It was thought that passage was likely and imminent. We were entering Hillcrest's busiest time of the year when we expected a large portion of our 1982 program to be sold. If the bill was retroactive or became effective immediately, it could likely wipe out a large portion of our 1982 program. Although this was a confusing time, it was not a time where anyone was panicking. We called in the accounting and legal experts and discussions were had as to the likely form of the legislation and its effective date. I called Mr. Karroll and Mr. Markowitz to inform them of what we had learned from our contacts in Washington. Mr. Karroll, I believe, suggested that Hillcrest could do "as of trading." I was familiar with this term although not as it related to Hillcrest straddles. It was suggested that because we had identified specific securities to include in the program and talked about the volumes that these trades could be booked earlier in the week. This suggestion did not alarm me. It should have but it didn't. It was very matter-of-fact. That afternoon I went to Ron Williams and asked him if we could do as of trading and he said yes and stated from a legal prospective why it was that we could do so. Saying almost obviously of course we've discussed the specific issues earlier on, etc., etc. In 1989 the opinion of Ron Williams would not be enough. In 1982, unfortunately, it was. This was again not something done in the middle of

the night. In my own mind I had no reason at that time to be scared or skeptical of what I was about to do.

I take responsibility for what I did and admit that what I did was wrong. Over the next two or three trading days, I effected purchases as of earlier days in the week. I called these trades in to our brokers in the usual manner. I documented them in the usual manner, but in my heart I knew they were not the normal transactions. I should have walked away but I did not. I was still comfortable with what I was doing and with the people who were around me. I can say from my heart that I never made that choice to step over the line. I was in an area that was conveniently complex. I didn't slow down enough to seek more objective views of "as of trading" and I am now paying for that mistake and will pay for that mistake for a long, long time.

New programs were designed with the help of our professionals to offer the benefits to our clients while conforming to the new legislation. Business went on as usual but not at such an accelerated pace or scale.

In the spring of 1984, we learned that Mr. Markowitz had come under Internal Revenue Service investigation and had admitted, according to press reports, that he had not effected any trades and that his brokerage activities were a sham. I was floored. I did not believe those activities were Hillcrest's. I saw his offices, I spoke with his people, I spoke with our accountants, I corresponded and reviewed and corrected documents with Mr. Markowitz' office, and to my knowledge, Alexander Grant was verifying the authenticity of the trades. It was all too real. Hillcrest became aware that it and its officers were being investigated. From that point on my life became one meeting after

another with lawyers and accountants. Over the years the civil suits followed and our civil responses to the Internal Revenue Service in Washington progressed. This has gone on for years and the benefits monetarily that I had earned at Hillcrest have steadily gone for the payment of fees and depositions and court appearances and trips to Washington to meet with the Justice Department and for copies and on and on. Where possible I have settled the civil actions that have been brought against me. I have paid the Internal Revenue Service an additional $180,000 for my own personal Hillcrest investment. I have spent more money than I have.

I can't describe my reaction to the criminal indictment. It was as if the blood drained from my brain. It was that sickening feeling of loss and fear and hopelessness where you turn and cringe and every muscle and fiber in your body is tense and you have no breath. You want to crawl inside yourself and die. You feel abandoned, betrayed, unworthy, lost. I think your instincts take over, you try to seek comfort in your family and you pray.

I have freely admitted even before the indictment what I did at Hillcrest. I did not hide or disguise my involvement in the as of trades, the back-dating. I have been deposed and interviewed for days on days and have tried to simply say what I did. In the spring of 1986, upon the advise of my attorneys, I was administered a polygraph examination. I have attached a copy of the report, which indicates that I answered all questions truthfully. In the fall of 1987, my attorneys and I even traveled to Washington to meet with Barry Roades who was in charge of this case at the U.S. Attorney's office at the time. I told him my story as honestly as I could and I even submitted documents that he requested in order for him to better understand the case.

In the seven years since this occurred I have learned that my life will go on. I have learned so much. My stepchildren are in college, my own first child is six and my baby, Marc, is two. I have drawn them and Charlie to me. I work very hard at trying to be a positive person with hopes and dreams for the future too.

I pray every day. I pray that I will be strong and turn this whole experience into a positive force. I pray that I will somehow turn all of my fear into courage. I pray for the continued love of my family and the support of my friends. I pray that my children will not learn to think less of me because of what I have done, but that if they do, that in their hearts they will forgive me. I pray for the opportunity to continue to share my experiences in whatever way I can through efforts that are important in our community. Right now I take more from those than I give. I need that support. I need that comfort. I need that nurturing.

I have the challenge now of putting my life back together. I look forward to the end of this ordeal, and I will forgive myself and ask to be forgiven. I am sorry that my government has had to prosecute me and I am sorry that because of my weaknesses others have suffered.

Judge Fish, right now I am acting on instinct. I am scared. I see me in the magazine picture behind bars and my children and husband on the outside. I hope this is not unfair to you but I must tell you I fear my son won't know me if I go to jail, that my children will suffer in their mother's absence. I can't envision who could take care of them as well as I and I am so fearful and ashamed that I may not be there for them. I am the best mom for them that I

can be. I am a good mother and a good wife and a good neighbor and I have worth and I have hope and I can contribute and I promise you that I will be all of these things. Judge Fish, I ask you for mercy.

This is my plea. Thank you for your concern and for the efforts of your staff and of the probation office who all worked so hard to be sure that you have all of the information you need to make your decision.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 2 1991
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

VS. CR-3-89-028-G

CAROL C. PEELER

FINDINGS, CONCLUSIONS AND
RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an order of this court, the subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

Petitioner seeks relief pursuant to the provisions of 28 U.S.C. §2255 from a probated sentence which was imposed by this Court in 1989 following petitioner"s plea of guilty to count 18 of the indictment in this case. The plea of guilty was entered pursuant to a plea agreement, a copy of which is attached as an exhibit to this report.

The sole ground alleged for relief is petitioner's claim that she was deprived of her constitutional right to effective assistance of counsel. Specifically, petitioner contends that her counsel failed to tell her that, prior to her indictment, the government had offered to give her immunity from prosecution in exchange for her cooperation in the investigation of Hillcrest Securities and related entities.

The following is a summary of the relevant facts alleged by petitioner in support of her petition for relief. Although many of petitioner's allegations of fact are sharply

disputed by her former counsel and others, for the purposes of this report petitioner's factual allegations will be presumed to be true.

Petitioner and other persons who were principals of the Hillcrest entities came under investigation by the Internal Revenue Service in 1984. Petitioner retained Mr. Darrell Jordan and the firm of Hughes and Luce to represent her. In December 1985 Mr. Bill Alexander, the Assistant United States Attorney who was assisting in the IRS investigation, telephoned Jordan and offered to give petitioner complete immunity in exchange for her cooperation in the investigation of the Hillcrest entities.[1] Jordan did not tell

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[1]As noted above, there is a sharp dispute about the facts. Alexander testified on deposition in related state court case that the offer of immunity was made and that is was clear and unequivocal; Jordan testified on deposition in the same case that no offer of immunity was made. And according to the petitioner, The United States Attorney for this district has given one or more affidavits, for use in the state court case, to the effect that no immunity was authorized or would have been authorized for petitioner. It is not necessary for the Court to resolve these disputed fact issues in order to decide the merits of petitioner's §2255 application.

petitioner about the offer of immunity. When Jordan did not contact Alexander with petitioner's response within the time stipulated by the prosecutor, Alexander offered immunity to "Buzz" Tompkins, who accepted without delay. Sometime later, Hughes and Luce retained the services of Mr. Doug Mulder, an experienced criminal defense attorney, to assist in representing petitioner. When Mulder became aware of the immunity offer, he attempted without success to get Alexander to renew the offer of immunity for petitioner. Alexander withdrew the offer of immunity and it was not available to petitioner after January, 1986 at the latest. The indictment against petitioner was returned on January 31, 1989. She entered a plea of guilty to count 18 of the indictment on or about March 29, 1989. At no time prior to her plea did Jordan or Mulder tell her about the offer of immunity which was made by Alexander in December, 1985.

It is clear from the record that the government initiated adversary judicial proceedings against petitioner on January 31, 1989 when the indictment was returned. It was therefore on that date that petitioner's 6th Amendment right to counsel attached. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 1882 (1972); Tarpley v. Estelle, Estelle, 703 F. 2d 157, 162 (5th Cir. 1983). And since petitioner had no 6th Amendment right to counsel prior to that date, the failure of counsel to advise her of the offer of immunity in 1985 did not constitute ineffective assistance of counsel which can be redressed in a §2255 proceeding. Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 1301 (1982). It is settled that "--the right to effective assistance of counsel is dependent on the right to counsel itself," Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 836 n. 7 (1985), and that "--where there is no constitutional right to counsel there can be no deprivation of effective assistance." Coleman v.

Thompson, U.S. __, 111 S.Ct. 2546, 2566 (1991). Petitioner is therefore not entitled to relief on her claim that counsel did not tell her about the offer of immunity prior to the time of her indictment.[2]

Petitioner is further not entitled to relief on her claim that counsel did not tell her about the offer of immunity after indictment and before she entered her plea of guilty. As petitioner recognizes, in order to prevail she must establish that counsel's performance was deficient and that, but for such deficiency, there is a reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). All parties agree that, at the time that the indictment was returned, the offer of immunity had been withdrawn for

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[2]The suggestion in petitioner's Reply to Government's Response, filed July 17, 1992, to the effect that the Fifth Circuit has held that the failure to communicate an offer of immunity constitutes ineffective assistance of counsel, is incorrect. In the case in question the Fifth Circuit expressly declined to reach the issue because no offer of immunity was made. United States v. Plewniak, 947 F.2d 1284, 1289 (5th Cir. 1991).

more than three years and there was no chance that another such offer would be forthcoming. Assuming, without deciding, that the failure of counsel to advise petitioner of the historical fact that the government had offered immunity during the investigation prior to indictment constituted unreasonably deficient performance under the **Strickland** standard, petitioner has alleged or shown nothing to establish that, but for

such deficient performance of counsel, there is a reasonable probability that the outcome of the case would have been different. Petitioner suggests that counsel could have moved to dismiss the indictment because petitioner had "missed her chance for immunity" because of Jordan's failure to advise her of the offer of immunity made in 1985. But for the Court to grant such relief, it would have to have found that petitioner had a 6th Amendment right to counsel prior to the time that adversary judicial proceedings were

initiated against her, which would have been directly in conflict with the decision by the Supreme Court in Kirby v. Illinois. ~, supra. This Court had, and has, no authority to grant such relief.

Finally, petitioner alleges that counsel gave her erroneous advice which influenced her decision to plead guilty.[3] Specifically, she contends that counsel's expressed opinion that she could not successfully defend herself by contending that she relied on professional advice was "probably erroneous." But it is clear from the authorities

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[3]On deposition in her state court action, petitioner gave the following testimony concerning her plea:

Q. —and that was aiding and assisting the filing of a false and fraudulent U.S. partnership return; is that right?

A. That is what I plead guilty to.

Q. Okay. And you plead guilty to that offense because you were guilty of it?

A. That's correct.

(Petitioner's Exhibit #17, p.120)

cited by petitioner that the advice, when given, was not so clearly erroneous as to fall below the level deposition in her state court action of competence required of counsel in criminal cases. **McMann v. Richardson**, 397 U.S. 759, 90 S.Ct. 1441, 1449 (1970).

RECOMMENDATION

I recommend that all relief requested be denied.

Signed this 23rd day of September, 1992.

/s/ JOHN B. TOLLE
UNITED STATES MAGISTRATE JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 1 1991
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION -- HON. A. JOE FISH)

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

DEFENDANT'S OBJECTIONS TO UNITED STATES MAGISTRATE'S FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW COMES Carol C. Peeler, Defendant, by and through her undersigned counsel, and files the following Objections to the September 23, 1992, Findings, Conclusions and Recommendation of United States Magistrate Judge

Tolle pertaining to Peeler's Motion for Relief pursuant to 28 U.S.C. §2255.

Objections to "Findings" -- the **FACTS.**

Peeler objects to the designation of "Findings" in the Magistrate's opinion and to all statements of purported fact which support the Conclusions and Recommendations of the Magistrate.[1] The reason for this is that there has been **no hearing** before the Magistrate.

Section 2255 plainly states that

> Unless the motion and the files and records of the case **conclusively show** that the prisoner is entitled to no relief, the court **shall** . . . grant a **prompt hearing** thereon, . . .

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[1] This Objection extends to the conclusion -- apparently as a matter of law rather than as a finding of fact -- that Peeler was not prejudiced by the failure of both of her counsel to apprise her of the lost chance for immunity until after she pled guilty. We have focused the majority of our efforts in this and prior pleadings on the failure of Darrell Jordan to communicate the offer in December of 1985 because the case on those grounds is so incredibly compelling. However, the subsequent failures of both Jordan and Mulder constitute ineffective assistance under the Strickland criteria.

Similarly, the statutory provision which empowers United States Magistrates to act in these matters states that "a judge may also designate a magistrate to **conduct hearings**, including evidentiary hearings, . . . ". 28 U.S.C. §636(b)(1)(B).

In light of the express provisions of section 2255, Peeler's position with respect to the hearing issue, is that, although the Court could grant Peeler's Motion without a hearing, it could not deny that Motion unless "it can be conclusively determined from the record that the petitioner was not denied effective assistance of counsel." **Diaz v. United States**, 930 F.2d 832, 834 (11th Cir. 1991).[2]

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[2] As noted in our Motion, the Diaz case clearly indicates that an attorney who fails to communicate the government's plea offer has rendered constitutionally ineffective assistance. The Court there denied relief on that basis, however, because it found that the lawyer had communicated this information to this client.

This case also discusses the requirement that a district judge in §2255 matters conduct a de novo review of a magistrate's ruling. Id. at 836. See 28 U.S.C. §636.

However, it should be noted that the main function of this objection is to focus the Court's attention on the proper place, i.e. on the **legal** foundation for the Magistrate's recommendation. For, Magistrate Tolle assumes (as he must in light of the compelling documentary evidence submitted in support of the Motion and the Government's admissions in its response), that Peeler hired Darrell Jordan to represent her, that former AUSA Alexander "offered to give petitioner complete immunity in exchange for her cooperation in the investigation of the Hillcrest entities," that "Jordan did not tell petitioner about the offer of immunity", and that, thereafter, the government gave its immunity to another Hillcrest principal and withdrew the

offer to Peeler and indicted her.[3] Magistrate's Opinion at p.2-3.

There is little doubt that such facts indicate a gross example of misrepresentation and negligence, i.e. unreasonable conduct by Peeler's defense counsel. Nor is there any question about the fact that Peeler was prejudiced by this conduct of her counsel. Thus, under the two-fold standard required by **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Peeler is entitled to have her conviction set aside. Accordingly, she objects to the Magistrate's failure to address her constitutional claim under the controlling **Strickland** precedent.

Objections to "Conclusions" -- the **LAW.**

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[3] The Magistrate's opinion neglects to mention the evidence which compels the conclusion that Jordan's failures in this regard were deliberately made because he was being "loyal to the others".

Peeler strenuously objects to the Magistrates legal conclusions. They are plainly wrong. Because the Magistrate has recommended that relief be denied on the basis of a legal issue which was not briefed by either Movant Peeler or the United States Government, these Objections will require some exposition.

The Magistrate has recommended that relief be denied on the basis of his conclusion that, at the time of the immunity offer, Peeler had no Sixth Amendment right to have a lawyer in the first place. Although we believe that conclusion to be erroneous, and will address the cases cited by the Magistrate, it is wrong to assume that a claim for collateral relief under §2255 or via habeas corpus on the basis of "ineffective assistance" is founded solely on the Sixth Amendment. Said another way, it seems that the Magistrate has focused on the question of whether or not, at the time of the immunity offer, it was incumbent upon the

government to **appoint** counsel for Peeler, rather than on the question of whether the defective representation by the lawyer who had been paid $250,000 to represent her renders her conviction constitutionally defective. That is error. This Court need not resolve that issue in order to grant Peeler's Motion because the courts have made it abundantly clear that ineffective assistance claims are premised, not only on the **Sixth** Amendment right to counsel, but also on the **Fifth** Amendment and Fourteenth Amendment guarantees of DUE PROCESS. Also, the Supreme Court itself has distinguished between the Sixth Amendment right to have counsel **appointed** for him, and the similar but different right -- also protected by the Sixth Amendment -- to have **effective** representation from whatever lawyer (appointed or retained) is representing an accused.

There are a myriad of cases which could be cited in this Opposition. However, in the interest of brevity, we

have tried to limit this pleading mainly to those authorities cited by the Magistrate in his Opinion, their progeny, and those ineffective assistance cases which pertain to similar factual allegations.

The Sixth Amendment provides, *inter alia*, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." Prior to **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this right was often overlooked. But, in that landmark case the Supreme Court held that the right was extended to the states via the due process clause of the Fourteenth Amendment. Since that time, the courts have put teeth into this provision. And the American public has become keenly aware of this protection in their Bill of Rights by virtue of the fact that it is included in the standard **Miranda** warnings which they hear on almost every police/crime movie and television show, i.e. "You have a

right . . . to a lawyer to represent you. If you cannot afford a lawyer, one will be appointed for you by the court."

As the case law has developed, the focus of the typical Sixth Amendment inquiry is whether the accused is at a **"critical stage"** of the prosecution. If he is, then the government must make sure that he either has a lawyer, or knowingly waives his right to have one. And, if the government fails to do so, then the accused is entitled to "ineffective assistance" relief pursuant to the Sixth Amendment. United States ex. rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982), squarely addressed the question of whether it is a "critical stage" of the proceedings when the accused is confronted with a decision of whether or not he will accept a plea bargain offer from the government. The Court held that "entering a guilty plea to an indictment, without the benefit of counsel, is a critical stage, . . . It seems to us that the **decision** to reject a plea

bargain offer and plead not guilty is also a vitally important decision and a **critical stage** at which the right to effective assistance of counsel attaches."

There is simply no logical distinction to be made between that situation and the one at bar. If it is critical for an accused to have the guidance and advice of counsel in deciding whether to accept a plea bargain offer, then *a fortiori* must it be critical to have **effective** representation when one must decide whether to accept or reject an immunity offer from the government which would avoid the entire criminal process. Thus, **Zelinsky** is strong authority which undermines the Magistrate's Conclusions and Recommendation and warrants the relief requested by Peeler.

Moreover, regardless of whether or not the Sixth Amendment would compel the appointment of counsel at this juncture, as we shall demonstrate the Fifth Amendment

guarantee of due process requires that any retained counsel representing the accused at the time of such an immunity offer must do so loyally and effectively, and that the government must honor and respect the individual's choice of counsel.[4]

Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), is the first case cited by the Magistrate. It is helpful to an understanding of one aspect of the Sixth Amendment rights. In that case the Court held that an accused identified at a preindictment identification made at a police station showup without any counsel present to

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[4] The Magistrate has cited United States v. Plewniak, 947 F.2d 1284, 1289 (5th Cir. 1991), in which the Fifth Circuit declined to reach the ineffective assistance issue because of the lower court's factual determination that the preindictment letter from the AUSA to defense counsel "did not constitute ineffective assistance of counsel". Although the Court did not squarely resolve the issue, it does suggest that, if a preindictment offer of immunity was not communicated to the client, then the client would be entitled to relief on an ineffective assistance theory. Moreover, the Court did not state that it was going to reject the ineffective assistance argument because there was no right to counsel in the first place.

represent him was not entitled to relief under the Sixth Amendment. The Court's reasoning, as Chief Justice Burger made clear in his concurring opinion, was that the Sixth Amendment right to have counsel did not attach until there was a **"criminal prosecution"**. 92 S.Ct. at 1883. In Kirby and subsequent cases the Court has acknowledged that its own cases pin the commencement of this critical stage at various points along the continuum of governmental action. The Kirby Court explained its constitutional concerns and the rationale for its holding in oft-quoted, practical, functional terms:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of **adversary criminal justice**. For it is only then that the government has **committed itself to prosecute**, and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant **finds himself** faced with the ***prosecutorial forces of organized society***, and immersed in the intricacies of substantive and procedural criminal law.

Id. at 1882 (emphasis added).[5]

Cases decided since Kirby help to put this matter in perspective, and to provide a framework for understanding the factual context of the case at bar. United States v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), reiterated the above-quoted holding of Kirby. But it made it crystal clear that the Sixth Amendment right to appointed counsel and the Sixth Amendment right to effective counsel are not coextensive:

> The narrow issue before the Court of Appeals and before us today is whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondents' situation. Respondents have not contended that they were denied the opportunity to retain their own private counsel . . . **Respondents also have not asserted a Sixth**

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[5] Significantly, Kirby also recognizes that the mere fact that a person does not have to have appointed counsel at a particular juncture in the proceedings is not entirely dispositive of constitutional concerns. Rather, other "abuses are not beyond the reach of the Constitution." 92 S.Ct. at 692. They must be tested by due process standards. Id.

> **Amendment ineffective-assistance-of-counsel** claim . . .

104 S.Ct. at 2296n.1 [emphasis added, citations omitted].

Subsequently, in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Court affirmed the overturning of a murder conviction because the police had obtained incriminating evidence after the accused had **asserted** his right to counsel. The Court emphasized that, for constitutional purposes, it really did not matter whether the right to have counsel emanated from a Sixth Amendment obligation on the government to provide/appoint counsel, or from a Fifth Amendment choice to request or retain counsel. Rather, its holding was "grounded in the understanding that 'the **assertion** of the right to counsel [is] a significant event,'" 106 S.Ct. at 1411, citing and quoting Edwards v. Arizona 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); and the following requirement of respect for the accused's choice:

> "Once the right to counsel has attached and been asserted, the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to **respect and preserve** the accused's choice to seek this assistance."

Id. at 1410n.8, quoting Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985). We now apply these principles to the case at bar.

First, with respect to the Sixth Amendment "critical stage" functional analysis, was Carol Peeler facing the "prosecutorial forces of organized society" in December of 1985 when the immunity offer was made, or was she not? The evidence on that point is clear and compelling. The Hillcrest investigation was begun in mid-1983 as a civil matter under the auspices of IRS Revenue Agent Paul Michael Smith. Exhibit 32, excerpts from the oral deposition of IRS revenue agent Paul Michael Smith, at p.

8 [hereinafter cited as Smith Depo.][6]. In his deposition, Agent Smith was asked "[w]hen did the matter become a **criminal matter** as contrasted to being a civil matter?". He responded, "sometime in 1985" when he personally made a "fraud referral". *Id.* at p. 10. Later in the deposition, when shown a copy of the criminal referral document, he corrected that testimony to October 4, 1984. This document, attached hereto as Exhibit 33, clearly targeted Carol Peeler for criminal investigation. But, perhaps it will be argued that an "investigation" by non-lawyers is not yet a "criminal prosecution" within the meaning of Kirby.

That argument need not detain the Court for long. Because in December of 1985 -- prior to the time that AUSA Alexander extended the offer of immunity -- the United

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[6] We have used sequential Exhibit numbers for the convenience of the Court. Other excerpted portions of Agent Smith's deposition testimony have previously been filed with the Court as Exhibit 8.

States Government had focused the "prosecutorial forces of organized society" on Carol Peeler and other Hillcrest principals. Exhibit 34 is a letter dated in December 13, 1985, from the Department of Justice (Tax Division) to United States Attorney Marvin Collins authorizing and requesting him to initiate grand jury proceedings with respect to the Hillcrest matter. The letter -- which again names Carol Peeler as a target of the investigation/prosecution -- specifically mentions and contemplates that the AUSA handling the investigation might pursue **immunity** in order to obtain cooperation and testimony. The testimony of Agent Smith established that the IRS had requested the appointment of an AUSA "to prosecute the case". Smith Depo. at p. 46. Similarly, the testimony of his coworker, IRS Criminal Agent Hernandez, established that, at the time the IRS sought the appointment of a prosecutor to conduct a grand jury inquiry that they were doing so, in part, to pursue

cooperation of a Hillcrest principal via immunity, and that the actual offer of immunity from AUSA Alexander to Attorney Jordan occurred immediately **after** the prosecutor received this letter. Exhibit 35, Hernandez Depo. Excerpts at pp. 66-67, 80.

The time limitations of 28 U.S.C. §636(b) have not permitted the undersigned counsel to read each and every ineffective assistance case in the last thirty years. However, no case has yet been found in which the United States Supreme Court has held that it was constitutionally permissible under Sixth Amendment analysis for the government to have an attorney working diligently to prosecute a criminal matter and interacting with the target defendant without that defendant having been accorded his right to counsel. Simply put, it is self-evident that, whenever the government has a **prosecutor** working with or

against an accused and interacting directly with him[7] there is a "criminal **prosecution**" within the meaning of **Kirby**. Thus, the other cases cited by the Magistrate are quickly and factually distinguishable on the grounds that, at the time in question, there was no functional equivalent of an on-going "criminal prosecution":

(a) In **Tarpley v. Estelle**, 703 F.2d 157, 162 (5th Cir. 1983), the defendant complained of having no counsel at all when he was brought before a magistrate after his arrest. There is no indication that the government had any prosecutor committed to the case at this

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[7] We want to make it quite clear that Peeler's case does not depend on any contention that there is a "critical stage" in a "criminal prosecution" for appointment of counsel purposes merely because a government attorney is investigating a matter. However, when that attorney is empowered to empanel a grand jury, has specifically targeted a given person for prosecution, and is dealing directly with that person or their representative on matters pertaining to the prosecution, including the possibility of immunity, then the person must surely have a commensurate right to counsel in their behalf.

hearing. Citing **Kirby** the Court stated, in dicta[8], that "it is only when 'the government has committed itself to prosecute' that the defendant is entitled to counsel." It also then stated that, even if it was wrong about the counsel issue, there had been no harm.

(b) The one page, per curiam, opinion in **Wainwright v. Torna**, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982), is likewise distinguishable. There habeas relief was denied to a petitioner who complained about his retained counsel's failure to seek **discretionary** review by the Florida Supreme Court, after he had already been convicted and his conviction upheld on direct appeal.

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[8] The Court actually granted habeas relief to Tarpley because of constitutionally defective jury instructions.

The Court stated that "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance by his retained counsel's failure to file the application timely". 102 S.Ct at 1301. This seems, at first blush, to make the Sixth Amendment appointment of counsel analysis coextensive with the "ineffective assistance" claim. Fortunately, however, the Court footnoted that very sentence to explain that, in addition to Sixth Amendment concerns, it was quite possible that the **Fifth** Amendment guarantee of <u>due process</u> could come into play -- although not on the facts before it. Once again, however, the factual context of this case was markedly distinguishable from the case of Carol Peeler.

(c) The constitutional claim in **Coleman v. Thompson**, 111 S.Ct. 2546, 2566 (1991), was even more attenuated than that in **Torna**. In **Coleman** the Court was faced with a claim that a lawyer's procedural default in seeking post-conviction collateral relief gave rise to a Sixth Amendment claim. Again, it did not involve a situation in which the government was actively prosecuting a case against an unrepresented defendant. Citing **Torna** and other cases, the Court held that, because there is no right to any counsel in state post-conviction matters, there could be no Sixth Amendment violation in the case before it. However, **Coleman** is supportive of Peeler's position in at least three different respects. First, it made it abundantly clear that attorney

misrepresentation which was constitutionally "ineffective" under the dual standards of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), would entitle a person to relief. Second, it reiterated the holdings of other cases to the effect that ineffective assistance was "imputed to the State". And, third, like **Torna**, it recognized that the **Fifth** Amendment due process analysis was separate and distinct from the Sixth Amendment question.

Finally, we come to the Magistrate's curious citation of **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 836, 83 L.Ed. 821 (1985) -- "curious" because a careful study of this case reveals that it is not supportive of the Magistrate's recommendations in the case at bar, but is supportive of Peeler's claim for relief. **Evitts** held, plainly and simply,

that **due process** requires a criminal defendant to have effective assistance of counsel on his first appeal as of right. It, thus, affirmed the granting of the Great Writ. The case was cited by the Magistrate because, in a footnote, it reiterated the holding of **Torna**, *supra*, that "the right to effective assistance of counsel is dependent on the right to counsel itself". 105 S.Ct. at 836n.7. But, the very citation of **Torna** -- which involved discretionary appeals -- is supportive of the distinction which we have made of that case. More importantly, in **Evitts** the Court was confronted with an argument by the state of Kentucky that is extremely analogous to the recommendation of the Magistrate in the case at bar. Kentucky argued that, because the Constitution does not require a state to have any system of appeals as of right in the first instance, then the fact that a defendant might get ineffective representation in the course of the gratuitous appeal that is present is inconsequential. The

Court rejected this argument resoundingly because it recognized that **due process** was a broader concept which required courts to take the situations as they were presented to them and make sure that they comported with the requirement for fundamental fairness. *Id.* at 838-39.

The lesson of **Evitts** is clear: if the state has an appeal (even one that is not constitutionally required), due process requires counsel to be effective in handling that appeal; similarly, if Peeler had a lawyer (regardless of whether or not the government was obliged to appoint one to represent her at this juncture), due process requires him to be loyal and effective. If he is not, his ineffectiveness is imputed to the government. Or, to put it into the words of **Moulton**, *supra*, once Peeler had chosen to have counsel, the government was constitutionally obliged to "honor" her choice. 106 S.Ct. at 484. And she was constitutionally

entitled to "effective" representation, within the parameters established by the Court in **Strickland**.

Several times during the course of the **Evitts** opinion, the Court analogized the plight of Lucey to "one who has no counsel at all." *Id.* at 836; also, 835n.6. Its reasoning was that, if the benefits which a person received from his representation were really not much better than a person who had "no counsel at all", then the person is entitled to relief under the Constitution. Ironically, the facts in the case before this Court graphically illustrate that Carol Peeler would have been much **better off** if she had had "no counsel at all".

Consider the following. Peeler's counsel failed her. Failed her miserably. He failed her because he was being "loyal to the others" rather than to his client. This Court is well aware of the fact that Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct (and its

predecessor) precluded AUSA Alexander from communicating the immunity offer directly to Carol Peeler when he knew that she was represented by Attorney Jordan. *See also* Rule 3.09 which contains further and special responsibilities of a prosecutor, including the admonition to make sure that an accused is advised of his/her right to counsel before any custodial interrogation and further precludes the prosecutor from encouraging "an unrepresented accused" to waive important rights -- like the right to remain silent. Knowing that Peeler had retained counsel, AUSA Alexander's hands were tied. He could not tell Peeler that he was willing to give her immunity; he could only tell her lawyer. Obviously, in retrospect, Peeler would have been much **better off** to have had no lawyer at all. In that event, Alexander could have, within the special constraints of rule 3.09, told Peeler about the immunity offer himself. She would have then been aware that she had been offered a

reasonable and expedient exit from the criminal process. She could have made her own decision. And, as the evidence before the Court indicates, she would have accepted the offer, conditioned as it was only on her willingness to tell the truth.

From a constitutional precedent standpoint, therefore, Evitts v. Lucey[9] supports Peeler's claim for relief in this case.

We conclude where we began. The question of whether a person is entitled to relief on the basis of constitutionally defective representation is not necessarily coextensive with the question of whether and when the government must appoint counsel. If that were the case, then it could produce the anomalous result that a person who

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[9] The Evitts case also demonstrates that, in cases of this nature, there are often overlapping constitutional guarantees which must be considered both separately and in tandem. E.g. 105 S.Ct. at 839-41.

could afford to hire counsel would actually have less protection than an indigent for whom counsel must be appointed. The Supreme Court resoundingly rejected such a distinction in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1716 &n.9, 64 L.Ed.2d 333 (1980):

> The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

100 S.Ct. at 1716.

Summary and Conclusion

In pure Sixth Amendment terms, Zelinsky supports the notion that a person who is accused of a crime but offered a deal from the government in exchange for their cooperation is at a "critical stage" in the "criminal

prosecution", and, therefore, entitled to effective representation of counsel. Moreover, **Evitts** is authority for the proposition that, even if a procedure or right is not constitutionally required, if it is available to a person who is accused of a crime, on trial for that crime, or in the process of a direct appeal from a conviction, then they are entitled to effective representation of counsel with respect to such matters -- regardless of whether that counsel is appointed by the government or retained privately. This dovetails with the notion repeated in **Moulton** and **Jackson** that, regardless of whether a person comes to have counsel via assertion of their Fifth or Sixth Amendment rights, they are entitled to effective representation.

The Magistrate makes no contention whatsoever that Carol Peeler's representation passes muster under the **Strickland** standard. Accordingly, Peeler Objects to the Magistrate's Findings, Conclusion, and Recommendation,

and urges the Court in conjunction with its statutory obligation to conduct a *de novo* review of the Magistrate's findings, to conduct an appropriate hearing and thereafter to vacate her judgment of conviction and discharge her from all charges.

Respectfully submitted,

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Certificate of Service

The undersigned counsel hereby certifies that he has caused a copy of the foregoing pleading to be served on all counsel of record via US Mails, this ____ day of _____, 1992.

_____

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 15 1991
NANCY DOHERTY, CLERK

3:92-CV-0847-G
ENTERED ON THE DOCKET
10-16-92 PURSUANT
TO FRCP RULES
53 AND 79A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

FINDINGS OF THE COURT

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the

Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

Signed this 15 day of October, 1992

/s/ A. JOE FISH
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT
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DALLAS DIVISION

UNITED STATES OF AMERICA

vs. Case Number: CR3-89-028-(02)-G

CAROL C. PEELER

JUDGMENT

The Court having heretofore entered its Findings in this case,

It is therefore ORDERED, ADJUDGED and DECREED that all relief requested be, and the same is hereby DENIED.

It is further ORDERED that the Clerk shall transmit a true copy of this Judgment, together with a true copy of the Findings of the Court, to Petitioner's counsel and the United States Attorney, Department of Justice, Tax Division, Washington, D.C.

Signed this 15 day of October, 1992.

/s/ A. JOE FISH
UNITED STATES DISTRICT JUDGE

(3)

FILED
JUL 26 1994
OFFICE OF THE CLERK

No. 93-1836

In the Supreme Court of the United States

OCTOBER TERM, 1994

CAROL C. PEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether petitioner had a constitutional right to the effective assistance of counsel more than three years before the institution of adversary judicial proceedings against her.

2. Whether the panel that decided petitioner's appeal was selected in a manner that violated the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-16) is unreported, but the decisions are noted at 9 F.3d 104 (Table) and 15 F.3d 181 (Table). The findings of the district court (Pet. App. 137-145, 178-179) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-18) was entered on January 19, 1994. A petition for rehearing was denied on February 16, 1994. Pet. App. 19-20. The petition for a writ of certiorari was filed on May 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Texas to one count of willfully aiding in the filing of a false income tax return, in violation of 26 U.S.C. 7206(2). She was sentenced to five years' probation, fined $100,000, and ordered to pay restitution. Approximately three years later, petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. Pet. App. 5-6.

1. Petitioner was the president of a corporation that traded government securities. Petitioner helped backdate documents on certain trades and then helped prepare a federal income tax return that falsely claimed more than $1 million in losses and interest expenses from the backdated transactions. Petitioner knew that the losses could not be legally claimed. Pet. App. 102-108.

After the IRS began an investigation of petitioner's corporation in 1984, she retained Darrell Jordan to represent her. In December 1985, an Assistant United States Attorney allegedly conveyed to Jordan an offer of transactional immunity for petitioner in exchange for petitioner's cooperation in the investigation. Petitioner was not informed of the alleged offer, and any such offer was withdrawn by late January 1986. Pet. App. 12-13.

Approximately three years later, in January 1989, petitioner was indicted. In March 1989, she pleaded guilty to one count of willfully aiding in the filing of a false income tax return. In April 1992, petitioner filed a motion for post-conviction relief, asserting that Jordan's failure to transmit the alleged immunity offer to her violated her Sixth Amendment right to effective assistance of counsel. Pet. App. 12-13.

2. The district court referred the motion to a magistrate judge who recommended denying the requested relief. While there was a sharp dispute about whether the government ever made an offer of immunity for petitioner to Jordan, the magistrate judge found it unnecessary to resolve that issue. Pet. App. 12 n.1. The magistrate judge concluded that petitioner had no right to counsel before her indictment, and thus no preindictment right to the effective assistance of counsel. *Id.* at 14. The district court adopted the magistrate judge's findings and conclusions and denied petitioner's motion. *Ibid.*

3. Without hearing oral argument, the court of appeals affirmed. The court noted that "[i]t is well-established that where there is no constitutional right to counsel there can be no deprivation of effective assistance." Pet. App. 6. The court further observed that "a defendant's right to counsel attaches only once adversary *judicial* proceedings are initiated against her." *Ibid.* Because the events about which petitioner complained occurred more than three years before adversary judicial proceedings were commenced against her, the court concluded that petitioner had "failed to state a claim for deprivation of effective assistance of counsel." *Id.* at 6-7.

Petitioner also argued that Jordan's failure to inform her of the alleged immunity offer violated the Due Process Clause of the Fifth Amendment. The court, however, refused to address that claim. It explained that because petitioner had raised that argument for the first time in her objections to the magistrate judge's report, it was not "properly before the district court." Pet. App. 7.

4. The court of appeals panel consisted of only two judges. The third member of the panel had recused himself and the case was decided by a quorum pursuant

to 28 U.S.C. 46(d). Pet. App. 8 n.**. Petitioner filed a petition for rehearing on the ground that Fed. R. App. P. 34 provides that only a panel consisting of three judges may decide a case without oral argument. Pet. 27-28. The panel granted the petition, vacated the quorum opinion, and ordered the case resubmitted to a three-judge panel. Pet. App. 9-10. A three-judge panel then affirmed the district court's decision, issuing an opinion that was identical to the opinion issued by the two-judge panel. *Id.* at 11-16.

ARGUMENT

1. Petitioner contends (Pet. 8-18) that, even if she had no right to counsel at the time of the alleged immunity offer, she nonetheless had a right to effective assistance from the lawyer she retained. This Court's decision in *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982), disposes of that contention. There, a defendant claimed that his attorney's failure to file a timely petition for certiorari in the State's highest court violated his right to the effective assistance of counsel. This Court held that because a defendant does not have a right to counsel to pursue discretionary state appeals, "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Ibid.*

Cases after *Torna* have reaffirmed its holding that persons have a constitutional right to the effective assistance of counsel only when they have a right to counsel in the first place. In *Evitts* v. *Lucey*, 469 U.S. 387, 396-397 & n.7 (1985), this Court held that because the Due Process Clause guarantees a right to counsel in first appeals, it also guarantees a right to the effective assistance of counsel in those appeals. This Court explained that "[o]f course, the right to effective

assistance of counsel is dependent on the right to counsel itself." *Ibid.* More recently in *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2566 (1991), this Court held that, because there is no constitutional right to an attorney in state post-conviction proceedings, a federal habeas petitioner cannot claim that he was deprived of effective assistance of counsel in those proceedings. The Court reiterated that "where there is no constitutional right to counsel there can be no deprivation of effective assistance." *Ibid.*

Petitioner contends (Pet. 9-11) that *United States* v. *Gouveia*, 467 U.S. 180 (1984), casts doubt on the holding in *Torna*. There, this Court held that prison inmates did not have a right to counsel before the initiation of adversary judicial proceedings against them. *Id.* at 192. In a footnote, this Court noted that the inmates had not asserted a Sixth Amendment ineffectiveness claim. *Id.* at 185 n.1. Petitioner contends that if the Sixth Amendment rights to counsel and effective assistance of counsel were coextensive, the footnote would be "meaningless surplusage." Pet. 11. Petitioner reads far too much into the footnote. That footnote simply described the limited nature of the claim that the inmates in that case were asserting. It did not purport to overrule *Torna*. Moreover, as discussed above, this Court has twice reaffirmed the holding in *Torna*. See *Evitts*, *supra*; *Coleman*, *supra*. Both of those cases were decided after *Gouveia*.

Petitioner alternatively contends that under the "peculiar facts of her case" she had a Sixth Amendment right to counsel at the time of the alleged immunity offer. Pet. 10 n.3. As this Court has repeatedly held, however, "[t]he Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings." *Davis* v. *United States*, No. 92-1949, slip

op. 4 (June 24, 1994); see also *Moran* v. *Burbine*, 475 U.S. 412, 429-431 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In this case, the alleged offer of immunity occurred more than three years before the commencement of adversary proceedings against petitioner. Accordingly, petitioner had no Sixth Amendment right to counsel at the time of that alleged offer.

Contrary to petitioner's claim, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), does not support a contrary conclusion. Although *Escobedo* relied on the Sixth Amendment in holding unconstitutional police questioning of a suspect who had been denied the right to consult with his attorney, that case has since been interpreted as protecting the Fifth Amendment privilege against compulsory self-incrimination. *Moran* v. *Burbine*, 475 U.S. at 429-430. This Court's decisions after *Escobedo* "foreclose any reliance [on it] for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings." 475 U.S. at 429.

Petitioner also contends (Pet. 18-21) that she had a constitutional right to effective assistance under the Fifth Amendment's Due Process Clause. Petitioner first presented that claim, however, in her objections to the magistrate judge's report. For that reason, the court of appeals did not view the question as properly before it. Pet. App. 15. Because petitioner did not present her Fifth Amendment claim in a timely manner and the court of appeals did not address it, that claim is not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).*

* Petitioner argues (Pet. 22 n.8) that her Fifth Amendment claim was presented in a timely manner because 28 U.S.C.

In any event, the failure of petitioner's attorney to transmit the alleged immunity offer did not violate due process. In *Torna*, this Court rejected the defendant's analogous contention that his counsel's failure to file a timely petition for certiorari violated the Due Process Clause. This Court held that even assuming that a due process interest was implicated, any deprivation "was caused by his counsel, and not by the State." 455 U.S. at 588 n.4. Here, as in *Torna*, any deprivation petitioner may have suffered was caused by her attorney, and not by the government. See *Coleman* v. *Thompson*, 111 S. Ct. at 2566-2567 (attorney error is imputed to the government only when the government has a duty to provide competent counsel).

Petitioner contends (Pet. 20) that under *Evitts* v. *Lucey*, even if the government was not required to provide her with counsel, she had a right under the Due Process Clause to effective assistance from the lawyer she had retained. That contention is without merit. As previously discussed, *Evitts*' holding that the Due Process Clause guarantees a right to the effective assistance of counsel on first appeals was expressly predicated on the existence of a constitutional right to counsel on those appeals. 469 U.S. at 396 n.7, 397.

2. Petitioner contends (Pet. 26-28) that her right to due process of law was violated because two of the three judges who decided her case also sat on the original two-judge panel that ruled against her. In petitioner's view, those two judges could not be impartial because they had

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636(b)(1) provides for de novo review of a magistrate judge's decision. That statute, however, entitled petitioner to de novo review of the claims she raised before the magistrate judge. It did not authorize petitioner to assert new claims that were not presented to the magistrate judge.

already made up their minds about the substantive issues in the case. As this Court recently explained, however, "opinions held by judges as a result of what they [have] learned in earlier proceedings," are "not subject to deprecatory characterizations as 'bias' or 'prejudice.'" *Liteky* v. *United States*, 114 S. Ct. 1147, 1155 (1994). This Court emphasized that "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Ibid.* Similarly, "[j]udges sit as a matter of course on rehearings of their own decisions." *Edwards* v. *United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (en banc), cert. denied, 379 U.S. 1000 (1965). Thus, the fact that two of the judges who decided petitioner's appeal also sat on the original two-judge panel that ruled against her did not violate petitioner's right to due process of law.

Petitioner also contends that due process was violated because the third judge on the panel was selected by one of the two judges on the original panel. Pet. 29-30. As petitioner concedes, however, the record does not support her factual assertion concerning how the third judge was selected. Pet. 29 n.12. Even if the third judge were selected by one of the other two judges, however, that would not violate due process absent proof that the selection was made for an improper reason or the judge selected was biased. See *United States* v. *Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989); *Cruz* v. *Abbate*, 812 F.2d 571, 574 (9th Cir. 1987); *United States* v. *Torbert*, 496 F.2d 154, 156 (9th Cir.), cert. denied, 419 U.S. 857 (1974). Petitioner has made no such showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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